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No. ——

IN THE
Supreme Court of the United States

ALLIED PILOTS ASSOCIATION,
RICHARD T. LAVOY,
and
BRYAN A. MAYHEW,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the contempt/procedural due process principle of *Mine Workers v. Bagwell*, 512 U.S. 821 (1994), requires that a compensatory civil contempt case involving a complex injunction, disputed factual issues, and a serious sanction for completed acts (here a $45,500,000 damages award) be adjudicated in accord with the basic due process principles governing the conduct of civil damages cases generally embodied in the Fifth Amendment of the United States Constitution—and, in the Federal Courts, the Federal Rules of Civil Procedure—and not through expedited procedures of a summary nature?

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PETITION FOR A WRIT OF CERTORARI

The Allied Pilots Association, Richard T. LaVoy, and Brian A. Mayhew pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in *American Airlines, Inc. v. Allied Pilots Ass'n*, No. 99-10814 (Sept. 21, 2000, as revised Sept. 27, 2000).

DECISIONS BELOW

The opinion of the Court of Appeals is reported at 228 F.3d 574, and is reproduced as Appendix A in the separately bound appendix to this Petition ("Pet. App.") at pp. 1a-23a. The order of the United States District Court for the Northern District of Texas judging the Petitioners in civil contempt is unreported and is reproduced as Appendix B at Pet. App. 24a-28a. The District Court's findings of fact and conclusions of law on contempt liability filed with its contempt order is unreported and is reproduced as Appendix C at Pet. App. 29a-38a. The District Court's final opinion on contempt liability and damages is reported at 53 F.Supp.2d 909, and is reproduced as Appendix D at Pet. App. 39a-96a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered September 21, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

I. THE DISTRICT COURT PROCEEDINGS

A. Introduction. In this case, the United States District Court for the Northern District of Texas, Wichita Falls Division (Kendall, D.J.), found that petitioners—the Allied Pilots Association ("APA"); its President, Richard LaVoy; and its Vice-President, Brian Mayhew—violated the District Court's temporary restraining order ("TRO") and, on the basis of that liability finding, imposed on petitioners a $45,500,000 compensatory civil contempt sanction in favor of respondent American Airlines, Inc. ("American").

The expedited liability proceedings that resulted in this judgment were summary in their nature:

- a February 10[1] American motion for a TRO, a non-evidentiary hearing that afternoon, and the District Court's issuance of the TRO at 4:00 p.m. that day;
- a February 11 American motion for an order to show cause why defendants (petitioners here) should not be held in contempt and a District Court show cause order—both stated in general and conclusory terms and both served simultaneously on petitioners at 5:00 p.m. that afternoon;
- a February 12 hearing convened at 10:00 a.m. and concluded that afternoon; and
- a February 13, 10 a.m. conclusive liability finding.

The "damages" proceedings were similarly abrupt and irregular: a February 17 damages hearing presentation by American affording petitioners no prior discovery and at which the District Court precluded petitioners from revisiting the issue of liability while permitting American to supplement its liability case; an April 12 damages hearing presentation by

[1] All dates are in 1999 unless otherwise specified.

petitioners, at which the District Court, while precluding petitioners from presenting liability witnesses, again permitted American to supplement its liability evidence; and an April 15 judgment of $45,500,000 from the bench.

In detail, the District Court proceedings unfolded here as follows.

B. The TRO Proceedings. This case arose out of a labor dispute between American and APA, a national labor union certified under the Railway Labor Act ("RLA") to represent some 9,300 American pilots. The dispute stemmed from American's acquisition of Reno Air, Inc. and American's announced intent to operate Reno without observing the terms and conditions of the relevant collective bargaining agreement. On February 5, after negotiations over the integration of Reno failed, APA members began a sick-out.

On February 10, American filed its complaint against APA and its national officers, directors and bargaining committee for injunctive relief and damages, alleging that the sick-out violated the RLA. With the complaint, American also filed a motion for a TRO. On that same day, the District Court held a *non-evidentiary* hearing, lasting approximately two hours, and then issued its TRO at 4:00 p.m. R. 181, 114.

The TRO contained one generally prohibitory paragraph enjoining the defendants and all those legally associated with them from, in essence, authorizing the continuation of, or participating in, the sick-out.[2] The TRO also stated one general command, requiring the defendants and those acting in concert with them to "take all reasonable steps in their power" to prevent the continuation of the sick-out. The TRO, lastly, imposed a number of specific, affirmative obligations, requiring the defendants, *inter alia*, to: direct the APA

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[2] The complete text of the TRO is to be found *infra* pp. 29-30 in the Addendum hereto.

members "to resume their normal working schedule"; issue a notice to the APA membership, "by the most expeditious means possible, . . . of the issuance, content and meaning of the TRO"; instruct the members to "cease and desist" from engaging in the sick-out; post the TRO notice on APA's web site; include the contents of the TRO "on all recorded telephone hotlines"; report all compliance efforts to the court by 12:00 noon on February 12, 1999.

C. APA's TRO Compliance Efforts. Immediately after the February 10, 4:00 p.m. issuance of the TRO, APA, through LaVoy and Mayhew, began its compliance efforts by drafting, and issuing at 7:30 p.m. that night, an initial alert on the APA telephone hotline and web site that quoted the entirety of the TRO's prohibitory paragraph and advised the membership of the following: the District Court has issued a TRO enjoining APA; APA attorneys are reviewing the TRO; APA "will comply with the Judge's Order"; and APA will provide the membership "with more specific information about the [TRO] as soon as we have had an opportunity to complete our review." The alert—before quoting the TRO's prohibitory paragraph directed at "Defendants . . . their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, or by and through their orders"—correctly identified the "defendants" referred to in that paragraph, who were not otherwise identified in the text of the TRO, as "APA's national officers, board of directors, and general counsel." R.126.[3]

The following day, February 11, APA issued its full TRO notice/return-to-work-directive to the membership as called

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[3] For all relevant purposes, the definition was accurate; the defendants were the APA, its individual national officers, its individual board members, and its negotiating committee. The only technical inaccuracy was its erroneous inclusion of APA's general counsel in its identification of the defendants.

for in the TRO. The notice/directive quoted the TRO in full; instructed all pilots to "resume their normal working schedule" (as specifically directed by the TRO) and to "otherwise comply" with the TRO; and stated that the APA and its officers "do not authorize, ratify or condone any sick-out or slow down or violation" of the TRO. R. 157-58. By 2:00 p.m. on February 11, the full notice was posted on all national and local APA web sites, recorded by LaVoy on the APA hotline, and sent via e-mail to all the pilots for whom APA had an e-mail address. R. 150-51.

LaVoy also distributed return-to-work directives to the APA's national and local officers and committee members instructing them to: comply with the TRO; inform all members of the TRO's issuance and distribute copies of the TRO to each member; instruct all members to resume their normal working schedule and otherwise comply with the TRO; advise all members that the TRO prohibits any sick-out or slowdown; and to post the TRO on all bulletin boards and local APA web sites. APA also issued a written script for volunteer pilots who were staffing the union's phone watch, which consisted of similar instructions. R. 152-55

D. The Show Cause Motion and Order. Also on February 11—some 24 hours prior to the time set in the TRO for APA to report its compliance efforts to the court—American filed a motion for an order to show cause why APA, LaVoy, Mayhew, and the other defendants should not be held in contempt.

The motion stated in the most general terms that: (1) the number of pilots on the sick list was greater at 10:51 a.m. on February 11 than the number on the list at 5:04 p.m. on February 10; (2) the February 10 "hotline issued by APA by telephone and internet is not in compliance with the Court's order," and (3) "the APA and the individual named defendants have not taken all reasonable steps in their power to prevent continuation of the pilot sick-out against

American." R. 119-120. The attached declarations and memorandum basically tracked rather than elaborated on the motion's contempt allegations. R. 121-26, 135.

The District Court immediately signed the proposed order to show cause that American submitted with its motion. R. 130. The order required petitioners to file "an answer specifically admitting, denying, or responding to the Motion for Contempt" by 9 a.m. February 12 and to appear and defend the contempt charge by 10 a.m. February 12. *Id.* The order did not elaborate on the contempt allegations. APA's counsel received service of American's motion, the supporting declarations and memorandum, and the signed show cause order together at 5:00 p.m., February 11. R. 140.

E. The February 12 Contempt Hearing. At 9:00 a.m. on February 12, APA, LaVoy, and Mayhew filed an answer and a motion to dissolve the order to show cause, both of which maintained that: (1) the February 10 alert did not, on its face, violate the TRO; (2) as of the evening of February 10, the defendants had not yet had adequate time to comply fully with the TRO; (3) compliance was effectuated by the full TRO notice/return-to-work directive issued on February 11; and (4) "[t]o conduct a contempt adjudication of defendants in the manner prescribed denies defendants due process of law, including ... adequate notice, an opportunity to appear," and an "opportunity to prepare a defense." R. 140-41.

At 10:00 a.m. on February 12, the District Court convened the contempt hearing. The only defendants in attendance were those who were already in the Dallas-Fort Worth area—LaVoy, Mayhew, APA Secretary-Treasurer Morgan, and several members of APA's negotiating committee. Tr. (Feb. 12) 5.

At the outset of the hearing, American made clear that "we're not going to ask for anything other than a coercive fine today. ... that exists day to day until this union gets the pilots back to work." *Id.* at 11-12. American's liability case consisted of the following:

- An American vice-president testified that the number of pilots on the sick list had increased during the first 15½ hours after the entry of the TRO—*viz.*, from 4:00 p.m. February 10 to 10:51 a.m. February 11—and that flight cancellations increased also. *Id.* at 15.
- American then called defendants LaVoy, Mayhew, and Morgan as witnesses. The questioning by American focused principally on the mechanics of the drafting and dissemination of the February 10 telephone hotline and internet bulletin and on the APA's "phone watch" informing pilots who called the APA headquarters of the issuance of the TRO. *Id.* at 35-54, 98-107.
- Finally, American then called Larry Foster and Dennis Patterson, local APA officials from the union's Dallas-Fort Worth "domicile" and questioned them primarily regarding pre-TRO conduct. *Id.* at 127-48, 170-84.[4]

The only questioning that was directed at any points that became a basis for the District Court's liability findings was the following:

- American and the court questioned LaVoy and Mayhew as to the intent behind the sentence of the February 10 alert that defined the defendants referred to in the TRO paragraph excerpted in that message. LaVoy responded that he believed the sentence was accurate and factual; Mayhew testified that he wanted

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[4] "Domicile" is the term used by APA to describe its 10 constituent local organizational units. Foster and Paterson testified that, prior to the issuance the TRO, his domicile operated a "phone tree" in which three to four volunteer pilots called APA members in that domicile and encouraged the job action. After the TRO issued, Foster instructed his phone volunteers to cease making these calls; the volunteers were then given the "phone watch" script and directed to follow it when receiving calls. *Id.* at 142-43.

to convey that the union and its officials "were under the gun." *Id.* 47-48; 105-06.

- American asked LaVoy whether a sentence in the February 10 and February 11 messages stating that "[t]his legal maneuvering by management does not bring us any closer to a negotiated settlement" was intended to encompass the TRO and whether LaVoy had considered the impact of that sentence; LaVoy responded that the sentence referred only to American's decision to pursue litigation rather than negotiation and that it was simply an editorial comment indicating that APA contested the litigation. *Id.* at 48-50.
- American questioned LaVoy on whether APA had set up a national "phone tree" to call APA's 9,300 members; LaVoy confirmed that no "phone tree" had been set up because of the volume of incoming calls. *Id.* at 32. American inquired whether the APA directives were phrased in the form of a "personal message"; LaVoy stated that he believed the APA hotline—which was recorded in his own voice—and written return-to-work directives *were* personal messages from the leadership. *Id.* at 137, 224-26.

After eliciting this testimony, American closed its case, repeating its request that the District Court impose "a coercive fine . . . that . . . exist[s] day to day until they have reached compliance." *Id.* at 234.

At the conclusion of American's case—given the generality of the notice provided, the less-than 24-hour period within which to prepare a defense, and American's representation that the hearing concerned prospective coercive relief liability and not compensatory damages for past misconduct—petitioners could do nothing more than recall LaVoy, who testified to the APA's compliance efforts, particularly the February 11 TRO notice/return-to-work directives. *Id.* at 188-222.

The District Court thereupon concluded the hearing and informed the parties that a ruling would issue the following morning. *Id.* at 239.

F. The Contempt Order, Findings of Fact, and Conclusions of Law. At 10:00 a.m. the next morning (February 13), the District Court issued its order concluding that APA, LaVoy, Mayhew were in contempt.[5] The District Court announced that its sanction would be an award of compensatory damages to American, the amount of which would be determined at a subsequent hearing. Foreshadowing the magnitude of its as-yet undetermined damages finding, the District Court then ordered that the APA, LaVoy, and Mayhew pay into the court registry $10 million, $10,000, and $5,000 respectively, as a deposit "toward the compensatory civil contempt fine likely to be ordered in this case," which the Court opined was likely to be "eight figures." Pet App. 28a. As the District Court put things in its order, "when all the dust clears, all the assets

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[5] Throughout the February 12 hearing, the District Court played an independent and active role as a complaining party, a role having nothing to do with its role as a disinterested magistrate adjudicating a law case:

- During the hearing, the District Court interjected to relate anonymous phone calls and messages the court had received from "irate" air travelers. *See, e.g., id.* at 79-80, 147 ("[M]y phone is ringing off the wall back here, and most of the calls that I'm getting are urging me on, telling me, in essence, they think death by lethal injection would be too good for the American Airlines pilots.").

- The District Court questioned LaVoy, Mayhew, Morgan, Foster, and Patterson on the size of their salaries and the source of their training, and *sua sponte* called all of the members of APA's negotiating committee who were present solely to elicit this same testimony. Tr. (Feb. 12) 55, 124, 138-39, 161, 163-79, 185. This "evidence" featured prominently in the Court's contempt order, where the court noted that many of the pilots "were taught to fly jets at taxpayer expense in the U.S. military, which of course enables them to earn their six figure incomes" and suggested that such pilots were not justified in seeking "more money . . . merely because American bought a small airline." Pet. App. 26a.

of the Union, including their strike war chest, will be capable of being safely stored in the overhead bin of a Piper Cub." Pet. App. 27a.[6]

Together with its order, the District Court filed an opinion stating its findings of fact and conclusions of law. In that opinion, the District Court interpreted its TRO, in combination with its comments at the TRO hearing, to mean that "American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease." Pet. App. 33a. Thus interpreting the TRO, the District Court found petitioners in contempt in that APA had not accomplished that result in the 15½-hour period from February 10, 4:00 p.m. (when the TRO issued) through February 11, 10:50 a.m. (when American inventoried the sick list).

The District Court's findings focused almost exclusively on the APA's February 10 communication. Pet. App. 31a-34a. But, rather than treating that communication for what it was—an initial alert prefatory to the full February 11 notice of the TRO/return-to-work directive that would issue upon review of the TRO by counsel—the District Court determined that APA was required to discharge all of its notice of the TRO and return-to-work directive obligations within 3½ hours of the TRO's issuance, a requirement nowhere stated in the TRO itself, and that the February 10 communication was, on that interpretation of the TRO, seriously incomplete. Pet. App. 32a-33a. The District Court also focused on the

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[6] The District Court, continuing in its aggrieved complaining-party role, opined in its order that the APA had been taken over by a "radical element . . . determined to fly American Airlines . . . into the side of the mountain" and suggested that the APA membership should vote the national officer defendants out of office for this "fiasco." The order was also replete with images of organized crime, describing the sick-out as a "shakedown," "extortion," and "the type of negotiation one usually sees when doing business with one of the five families in New York." Pet. App. 24a-25a.

sentence in the February 10 communication that had defined the "defendants"—a term otherwise undefined in the TRO text quoted therein—and found that it "sen[t] the clear message that individual Union members were not covered." Pet. App. 32a.[7]

On these bases, the District Court concluded that the February 10 initial alert was "foreseeably ineffective" and that its ineffectiveness "was not only . . . foreseeable, it was intended." Pet. App. 33a.

Having treated APA's first word to its members as its last word, the District Court, in the two sentences devoted to the subject of APA's February 11 notice/return-to-work directives, concluded that these communications "came too little too late." Pet. App. 34a. And finally, that court found that that petitioners violated the "all reasonable steps" requirement because APA—which put out its notice of the TRO/return-to-work directive through the internet, telephone hotline, e-mail, and hard copies—used a "phone watch" to give members who called in notice of the TRO and direction to return to work rather than setting up a "phone bank" to make outgoing calls to the pilots. Pet. App. 35a.

G. The "Damages" Proceedings. The District Court set the damages hearing for February 17, without affording APA, LaVoy, and Mayhew discovery. Petitioners responded by moving to have the contempt judgment set aside on the grounds that the adjudication of contempt liability was "premature" and procedurally defective. R. 215-21. The District Court denied that motion and announced that the contempt issue could not be "relitigate[d]." Tr. (Feb. 17) 4. In the course of the hearing, however, the District Court

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[7] The District Court then faulted the initial alert for failing to include the complete text of the ordering paragraphs of the TRO, failing to include an instruction telling pilots to "resume their normal working schedule" and to "cease and desist" from engaging in the sick-out. Pet. App. 32a-33a.

permitted American, over objection, to supplement the record on contempt with five additional exhibits from the pre-TRO period. *Id.* at 57.

After American made its damages presentation, the District Court continued the hearing until April 12. During that period, the District Court allowed only "limited document discovery." *Id.* at 16-17, 60-61. And, when American moved to prohibit APA from calling a number of pilot witnesses on the ground that APA was "asking the Court to relitigate the issue of contempt," R. 678, 680, the District Court granted the motion and disallowed the proposed witnesses. Tr. (April 12) 23; *id.* at 33 ("I don't want to revisit the contempt").[8]

Notwithstanding this ruling, however, the District Court granted, over APA's objection, American's second motion to supplement the record of the February 12 contempt hearing with materials directly relating to contempt liability. R. 774, 702-773. These materials, in addition to those admitted on February 17, were later relied on by the District Court in its June 23 opinion to supplement its February 13 findings on contempt liability. Pet. App. 52a-53a, 62a-65a, 69a.

H. The Damages Order and Final Opinion. At the close of the damages hearing on April 15 the District Court assessed $45,507,280 in damages for the two-day February 10-February 12 period in which the court found the defendants in contempt. Tr. (April 15) 272.

On June 23, 1999, the District Court stated its judgment on damages in writing in a heavily revised and augmented opinion on liability as well as on damages. This lengthy

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[8] The District Court told APA's counsel that "probably all your sick pilots are going to get a chance to testify" in other lawsuits. Tr. (April 12) 32. Observing that the defendants were defending class actions filed by passengers, the court opined that APA members may possibly be held personally liable, "Now, if that's the case, all these folks are probably going to get a chance to have their depositions taken. That would preserve your record, and we can talk about that later." *Id.* 32-33.

opinion made new contempt findings based on the evidence that the District Court admitted after the February 12 contempt hearing, evidence which was not tested through examination in the crucible of a trial. *See* Pet. App. 52a-53a, 62a-65a, 69a.[9]

Petitioners timely appealed.

II. THE COURT OF APPEALS' DECISION

In their appeal, APA, LaVoy, and Mayhew argued, insofar as is pertinent here, that the District Court's use of expedited procedure of a summary nature for determining liability for compensatory civil contempt damages violated the contempt/procedural due process principle enunciated in this Court's decision in *Mine Workers v. Bagwell*, 512 U.S. 821 (1994). The Court of Appeals rejected that argument in the following terms:

> Defendants argue that they were entitled to more process than they received during the contempt phase of this proceeding. As primary authority for this assertion,

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[9] Indeed, the June 23 decision rests in large part on a new theory of liability based upon American's untested post-February 12 evidence: In its February 13 contempt findings, the District Court rested its contempt findings on alleged sins of commission (*e.g.*, the language used by LaVoy and Mayhew in the February 10 alert) and on alleged sins of omission (*e.g.*, APA's failure to implement a "phone bank"). But in its revised opinion, that court found the APA's compliance actions inadequate and contemptuous by finding that the February 10 and February 11 communications were framed in "code language" whose true import was that the pilots should defy the TRO. Pet. App. 69a. This finding was based on the untested liability evidence submitted by American after the close of the February 12 hearing: e-mails sent by pilots and by local APA "domicile" officials. *Id.* The District Court, finding that these communications signaled to members that any APA post-TRO return-to-work directives should not be taken seriously, also found that APA's failure affirmatively to disavow such signals by using specific locutions such as "clear the sick list immediately" was itself an act of contempt. *Id.* at 53a, 66a, 72a-73a.

the defendants assert that the standard applied in *International Union, UMWA v. Bagwell*, 512 U.S. 821 (1994), should apply in the situation *sub judice*. We decline the invitation to apply the principle enunciated in *Bagwell* to civil contempt situations.

Contempt proceedings are naturally "summary in form and swift in execution." *Ryals v. United States*, 69 F.2d 946, 947 (5th Cir. 1934). The defendants' argument that they are entitled to what amounts to a full trial on the merits of their contempt charge is contrary to case law. *See, e.g., Placid Refining Co. v. Terrebonne Fuel & Lube*, 108 F.3d 609, 613-14 (5th Cir. 1997) (holding that civil contempt proceeding that gave "notice and an opportunity to be heard" was constitutional), *accord Alberti v. Klevenhagen*, 46 F.3d 1347, 1359 (5th Cir. 1995). [Pet. App. 16a-17a.]

REASONS FOR GRANTING THE WRIT

This case presents in the most pointed fashion the one major contempt/procedural due process question left open in this Court's seminal decision in *Mine Workers v. Bagwell*, 512 U.S. 821 (1994): The question of the requisite procedures for hearing and deciding *compensatory civil contempt cases* bottomed on allegations of "out-of-court violations of a complex injunction," *Bagwell*, 512 U.S. at 837, *viz.*, the requisite procedures for the class of contempt cases that are "nominally those of contempt [but] really proceedings to award damages to the plaintiff" for past conduct, *Worden v. Searls*, 121 U.S. 14, 26 (1887).

The contempt power—particularly when exercised through expedited procedures of a summary nature—places the greatest strains on the rule of law and on the judicial branch as one of the three separate branches of government, each with delimited powers.

Given that strain and given the inherent human frailties of any trial judge who is faced with a supposed disobedience or

defiance of the judge's orders, throughout this century this Court has paid particular heed to the importance of procedural due process limitations on the contempt power compatible with the proper "balance [between] the competing concerns of necessity and potential arbitrariness." *Bagwell*, 512 U.S. at 831.[10]

And, given the delicate nature of that balance—as well as the stakes for the parties, for the trial courts, and for the fair and proper administration of the judicial system—we submit that the question presented here can no longer be left an open question but rather requires this Court's authoritative answer. Indeed, it is the Fifth Circuit's ill-considered answer to this question that presents the most compelling case for a well-considered answer by this Court.

The Court of Appeals ruled that compensatory civil contempt proceedings are "naturally 'summary in form and swift in execution,'" and that compensatory civil contempt defendants, in contrast to all other civil damages case defendants, are *not* entitled to the procedural due process that attends "a full trial on the merits of their contempt charge"—as provided for in the federal courts by the Federal Rules of Civil Procedure—but only to the expedited procedures of a summary nature offered by the "[s]imple," conclusory notice

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[10] This Court's modern contempt precedents progress from the early view that the contempt power is procedurally unbounded to a view that contempt proceedings, like judicial proceedings generally, must recognize the claims of due process. *See, e.g., Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911) (requiring proof beyond a reasonable doubt in criminal contempts); *Cooke v. United States*, 267 U.S. 517, 525 (1925)(requiring notice of charges and right to present a defense and have and assistance of counsel in criminal contempts); *Bloom v. Illinois*, 391 U.S. 194 (1968) (requiring jury trial for "serious [criminal] contempts"); and *Bagwell*, 512 U.S. at 836-37 (holding that fixed, non-compensatory fines for out-of-court violations of complex injunctions cannot be imposed absent criminal procedural protections).

and the immediate, next-day hearing provided here. Pet. App. 17a .

In so ruling, the court below "decline[d] the invitation to apply the principle enunciated in *Bagwell* to civil contempt situations," and instead relied entirely on Court of Appeals cases that in no way support the proposition that a party may be found liable for, and sanctioned with, massive compensatory contempt damages for past conduct absent full civil due process. Pet. App. 16a.[11]

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[11] *Ryals v. United States*, 69 F.2d 946, 947 (5th Cir. 1934), is a museum piece whose obsolescence is proved by *Bloom v. Illinois*, 391 U.S. 194 (1968). *Ryals* was a criminal contempt case in which the trial court summarily adjudged the defendant in contempt for assaulting a court officer and imprisoned him for one year without a charge, a jury trial, findings of fact, or a judgment of guilt. The Court of Appeals reversed, requiring "a formal charge, a hearing before the court, and a formal judgment of guilt," but not a jury trial. Under *Bloom*, an alleged criminal contempt and a punishment of one year's imprisonment is not subject to "summary . . . and swift" adjudication at all but to a full trial by jury.

Aside from drawing on *Ryals* for its general—and entirely anachronistic—language, the Court of Appeals cited three cases to justify eschewing analysis under this Court's "*Bagwell* principle," *viz.*, that due process in the context of the contempt power requires a "balance" between "the competing concerns of necessity and potential arbitrariness," 512 U.S. at 832:

- *Placid Refining Co. v. Terrebonne Fuel & Lube*, 108 F.3d 609, 613-14 (5th Cir. 1997), was cited for the proposition that a "civil contempt proceeding that gave 'notice and an opportunity to be heard' was constitutional." Pet. App. 17a. In fact, that case held that a compensatory civil sanction of attorney's fees and costs, entered "[a]fter extensive discovery and a hearing on the merits," *id.* at 612, was constitutional.

- *Alberti v. Klevenhagen*, 46 F.3d 1347, 1359 (5th Cir. 1995), cited as in "accord" with *Placid Refining*, was a *coercive* civil contempt case, which under the *Bagwell* principle eschewed by the Court of Appeals, is a class of cases entirely distinct from *compensatory* civil contempt cases. *See infra* pp. 24-26.

The decision below could not be more wrong in its holding. The proposition that a compensatory civil contempt defendant facing a complex legal claim that rests on the proof of crucial disputable facts as to events that have occurred in the past and that entails millions of dollars of potential liability—here, $45,500,000—is not entitled to the basic procedural protections accorded all other civil-damages case defendants cannot be squared with the "principle [of] *Bagwell*" and defies every due process precept.

Nor could the decision be more wrong in its method. Simply stated, the Courts of Appeals are not entitled to decide legal questions by cavalierly dismissing the principles enunciated in this Court's decisions and by placing their reliance on inapposite lower court precedents. That is particularly so where, as here, the decision breaks faith with this Court's contempt/due process precepts and with the general understanding that in the Federal Courts, civil contempt liability proceedings are to be adjudicated in accordance with the due process benchmark provided by the Federal Rules of Civil Procedure. *See, e.g., Rogers v. Webster*, 776 F.2d 607, 610 (6th Cir. 1985) ("Civil contempt is a civil proceeding governed by the Federal Rules of Civil Procedure.").

And, it is difficult to see how a post-*Bagwell* contempt/due process decision could be more far-reaching in its mischievous potential. The Virginia courts' aggressive

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• *United States v. Powers*, 629 F.2d 619 (9th Cir. 1980) (cited for its "simple notice" statement) is a non-summary criminal-contempt case involving a "discrete readily ascertainable" fact (a witness's failure to appear), and again under the *Bagwell* principle, is inapposite. Moreover, the *Powers* court went on to say: notice must "inform the contemnor of the nature of the charge and enable the contemnor to prepare a defense," that a "reasonable" notice period varies with the circumstances, and that a five-day notice period (borrowed from Criminal Rule 45(d) and Civil Rule 6(d)) should apply absent "a compelling need to shorten the time." *Id.* at 625.

attempt in *Bagwell* to expand coercive civil contempt made it all but certain that trial judges could—and thus would—hold parties in contempt and impose monetary penalties through expedited procedures of a summary nature, thereby dispensing with any need to invoke criminal contempt with its attendant procedural due process complexities and its due process protections against abuse of the contempt power. The Fifth Circuit's aggressive expansion of compensatory civil contempt is of the same order: The Court of Appeals' decision opens the widest alternate leeway for the very abuse of the contempt power that *Bagwell*'s criminal contempt/due process holding is intended to preclude: adjudication by the judge who has issued a complex injunction—outside the institutionalized procedures for the even-handed administration of the law—of claims of out-of-court disobedience of that injunction with the end in view of imposing substantial monetary liability on the defendant.

As this case shows, the costs of opening that leeway are great. We are, of course, most mindful of the multimillion dollar judgment in this case issued without the process that is deemed due to defendants facing large damages claims—and far smaller ones. But, given the nature of the contempt power and its potential for abuse, the harm worked by the decision below to the interest in ensuring even-handed use of judicial power and to the federal court civil justice system—while immeasurable—is far greater still.

In schematic terms, the multimillion dollar retrospective compensatory damages case here and the multimillion dollar retrospective fine case in *Bagwell* were means of adjudicating indirect contempts through expedited proceedings of a summary nature. The Virginia courts "levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction" without observing the procedures that due process requires in ordinary criminal proceedings. So here, the District Court awarded compensatory damages for such "out-

of-court violations of a complex injunction" without observing the procedures that due process requires in ordinary civil proceedings.

The results in the Virginia courts and in the courts below here were predictably similar—a judicial finding of liability and the consequent imposition of a multimillion dollar judgment. And, those results are contrary to the genius of the judicial system as a justice system and to this Court's contempt/due process jurisprudence as most recently elaborated in *Bagwell*.

In sum, all of the considerations that called for a grant of *certiorari* in *Bagwell*—together with the added considerations of safeguarding the vitality and integrity of the Court's decision in that case and of assuring the fair and even-hand administration of the law by the Federal Courts—call for a grant of *certiorari* in this case.

II

The *Bagwell* litigation was, of course, focused by an ongoing dispute as to whether scheduled non-compensatory fines for violations of a complex injunction were properly characterized as forward-looking, coercive civil sanctions—requiring only expedited proceedings of a summary nature—or as retrospective sanctions for " 'completed act[s] of disobedience,' such that the contemnor cannot avoid or abbreviate the [punishment] through later compliance"—requiring full criminal procedure. 512 U.S. at 828-29 (quoting *Gompers*, 221 U.S. at 443).

Consequently, the *Bagwell* opinion treats with the requisite procedures in compensatory civil contempt cases only in passing and in the most general terms.[12] And, the *Bagwell*

[12] *See* 512 U.S. at 838 ("Our holding [that non-compensatory fines cannot be imposed for out-of-court disobedience of complex injunctions absent a jury trial and other criminal procedural protections] leaves

holding—that such retrospective non-compensatory sanctions can *not* be imposed absent full criminal due process—does not in terms determine what process is due *on the civil side* where a party faces allegations of "out-of court disobedience to a complex injunction" and where the remedy meted out is not a forward-looking coercive sanction but rather a non-purgable retrospective award of compensatory damages for past acts of alleged disobedience.

But, it is our submission that the *Bagwell* analysis, and the *Bagwell* principle crystallized by that analysis, do dictate the answer to the contempt/due process question here as well as to the question posed in *Bagwell* itself. The very analysis and the very principle that led this Court to conclude that the non-compensatory $52,000,000 sanctions in *Bagwell* could not, consistent with due process, be imposed absent full *criminal* due process also resolutely counsel that the $45,500,000 compensatory contempt sanction imposed here could not, consistent with due process, be imposed without full *civil* due process in the form of the "full trial on the merits" that the Court of Appeals held was *not* necessary here.

(1) *Bagwell* addressed "the ultimate question" posed by any contempt/due process case: "what procedural protections are due before any particular contempt penalty can be imposed." 512 U.S. at 830-31. This "ultimate question," the Court explained, requires careful attention both to the purpose of the contempt power and to its inherent dangers. In this regard, the Court observed first that:

> [t]he traditional justification for the relative breadth of the contempt power has been necessity: Courts independently must be vested with "power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and ... to preserve themselves and their officers from the approach and

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unaltered the longstanding authority of judges . . . to enter broad compensatory awards for all contempts through civil proceedings.").

> insults of pollution." *Anderson v. Dunn*, 6 Wheat. 204, 227 (1821). [512 U.S. at 831.]

And, the Court then added that:

> the contempt power also uniquely is "liable to abuse." *Bloom*, 391 U.S., at 202, quoting *Ex parte Terry*, 128 U.S. 289, 313 (1888). Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. Contumacy "often strikes at the most vulnerable and human qualities of a judge's temperament," *Bloom*, supra, at 202, and its fusion of legislative, executive, and judicial powers "summons forth . . . the prospect of 'the most tyrannical licentiousness.'" *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 822 (1987) (SCALIA, J., concurring in judgment), quoting *Anderson*, 6 Wheat., at 228. [512 U.S. at 831.]

All this being so, the Court's "jurisprudence in the contempt area has attempted to balance the competing concerns of necessity and potential arbitrariness by allowing a relatively unencumbered contempt power when its exercise is most essential, and requiring progressively greater procedural protections when other considerations come into play." 512 U.S. at 832.

Having set forth the considerations that must be weighed in determining the appropriate level of procedural due process, the *Bagwell* Court put the matter in concrete terms by stating the paradigm case for necessity and the paradigm case for the most exacting procedures:

"The necessity justification for the contempt authority is at its pinnacle, of course, where contumacious conduct threatens a court's immediate ability to conduct its proceedings, such as where a witness refuses to testify, or a party disrupts the

court." 512 U.S. at 832-33. This judicial "power of self-defense"—permitting the immediate summary adjudication of such "direct" contempts provided that the court does not mete out "serious" punishment—has "been tolerated" because "of the court's substantial interest in rapidly coercing compliance and restoring order, and because the contempt's occurrence before the court reduces the need for extensive factfinding and the likelihood of an erroneous deprivation." *Id.*

But "[s]ummary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty direct contempts." 512 U.S. at 832. And, "further procedural protections are afforded for contempts occurring out of court, where the considerations justifying expedited procedures do not pertain." *Id.* at 833. "For a discrete category of indirect contempts"—those "involving out-of court disobedience to complex injunctions," *id.*, and the imposition of "serious criminal penalties" including "determinate, retrospective criminal fines which [the defendant party] had no opportunity to purge once imposed," *id.* at 837—concerns of potential arbitrariness are preeminent. Because such cases "often require elaborate and reliable fact finding," and because the alleged contempts themselves "do not obstruct the court's ability to adjudicate the proceedings before it," this Court observed, "the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial." *Id.* at 834.

Hence, *Bagwell* holds that such contempts require the full protections normally incident to the criminal process: "Under these circumstances, criminal procedural protections ... are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." 512 U.S. at 834. "Where, as here, 'a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power.' " *Id.* at 839 (quoting *Bloom*, 391 U.S. at 209).

(2) Compensatory civil contempt cases "are essentially backward looking, seeking to compensate the complainant through the payment of money for damages caused by past acts of disobedience." *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1344 (3d Cir.1976). In their retrospective nature, compensatory civil contempt cases are analogous to criminal contempt cases: both sanction the contemnor for a completed act and neither permits the contemnor to "avoid or abbreviate" any threatened sanction "through later compliance." *Bagwell*, 512 U.S. at 828-29.[13]

For this very reason, compensatory civil contempt in no way implicates the countervailing judicial "necessity" concerns that, as *Bagwell* makes clear, provide the sole justification for resort to expedited process of a summary nature and for departing from the due process guarantees that attend ordinary civil (or ordinary criminal) actions.

It is equally to the point that the other *Bagwell* considerations—those that go to the need for "elaborate and reliable factfinding"—also forcefully counsel against the kind of expedited process of a summary nature by which this compensatory civil contempt case was dispatched.

First, the proceedings here clearly involve alleged "out-of-court disobedience of a complex injunction" within the intendment of *Bagwell*. The TRO's terms required the APA and its officers to issue their notice and return-to-work directives through manifold media in order to reach its 9,300 pilot members scattered throughout the country, and to otherwise use "all reasonable steps within their power" to effectuate an end to the sick-out. Moreover, as the District Court read the TRO, it required that "American Airlines planes . . . start flying again immediately" and required too

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[13] *See also* Doug Rendleman, "Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction," 1980 U. Ill. L. Forum 971 (1980) ("Judges use criminal and compensatory contempt when it is too late to coerce the defendant into the desired mode of conduct.").

that the sick-out "must immediately cease." Pet. App. 32a, 33a, 50a. It should be needless to say that such commands raise substantial issues of compliance, of ability to comply, and of agency. This case is at the other extreme from those "involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment," in which "the need for extensive, impartial factfinding is less pressing." *Bagwell*, 512 U.S. at 833.

Second, and of equal moment, this case points up the unique dangers of the contempt power, and bears out most vividly this Court's admonition that "contumacy"—whether real or perceived—"often strikes at the most vulnerable and human qualities of a judge's temperament." 512 U.S. at 831 (quoting *Bloom*, 391 U.S. at 202). The District Court's assertion of the role of an active—and actively aggrieved—complaining party, *see supra* pp. 9-10, proves again the concern that "[w]hen the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true . . . . He truly becomes the judge of his own cause." *Green v. United States*, 356 U.S. 165, 199 (1958) (Black, J., dissenting).[14]

In sum, in compensatory civil contempt proceedings such as the one at issue here, there is *no* judicial necessity that permits departure from the incidents of civil due process applicable in all civil damages proceedings. And, there is every potential for unfairness to alleged contemnors from using the precipitate process utilized by the District Court here to determine the complex legal and factual issues as to compliance with a court order and as to damages resulting

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[14] *Green*'s holding that a jury trial is not available in criminal contempt was overruled by the Court ten years later in *Bloom*, 391 U.S. at 199, a decision that vindicated Justice Black's *Green* dissent.

from non-compliance, particularly where great financial consequences can weigh in the balance.[15]

(3) To put the foregoing in proper perspective, we hasten to add that civil contempt is not a unitary category and that expedited procedures of a summary nature *are* proper in *coercive civil contempt* cases. Whereas compensatory civil contempt provides retrospective relief, "[c]oercive sanctions, in contrast, look to the future and are designed to aid the plaintiff by bringing a defiant party into compliance with the court order." *Latrobe Steel*, 545 F.2d at 1344. In such proceedings, the "necessity" side of the balance tips heavily in favor of abbreviated process to meet the exigency of continuing or threatened court-order disobedience and to secure prompt obedience to the order.

And, on the other side of the balance, "potential arbitrariness" is alleviated by the unique characteristics of the coercive civil contempt regime. That regime entails a three-stage process, consisting first of the issuance of the underlying order (such as the TRO here); second, an expedited hearing leading to a "conditional order finding ... contempt" and threatening conditional sanctions for the defendant's failure to carry out the court's specific commands as spelled out in the contempt order; and third, imposition of the threatened penalty, after due notice and a hearing, if the party fails to comply. *See, e.g., NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981).

The defining feature—and the saving grace—of coercive civil contempt regime is that the initial finding of contempt is both *conditional and prospective*, allowing the defendant an opportunity to purge through compliance and avoid the

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[15] And, as the D.C. Circuit noted decades before *Bagwell*, "Certainly the history of contempt litigation, especially in regard to labor disputes, prescribes extreme care and insistence on the full indicia of due process in contempt cases." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 380 F.2d 570, 582 (D.C. Cir. 1967).

sanction. *See Bagwell*, 512 U.S. at 828-29; *Shillitani v. United States*, 384 U.S. 364, 366-69 (1966). The danger to alleged contemnors and to the integrity of the civil justice system inhering in the summary part of this procedure is thus mitigated by the provisional nature of the contempt finding, the additional specification of the actions required to satisfy the underlying order, and the opportunity to "purge" the contempt.

Such coercive civil contempt cases stand on an altogether different footing from the instant compensatory civil contempt case, where the objective of the proceeding is not to secure compliance with a court order under the exigent circumstances of a continuing violation, but rather to provide a retrospective damages remedy for past disobedience. There is, therefore, no judicial "necessity" consideration that justifies the truncated process that the District Court held here.

(4) In the Federal Courts, the benchmark for full civil due process is provided by the Federal Rules of Civil Procedure. As this Court recently pointed out, the Federal Rules, particularly those ensuring "a proper opportunity to respond" to a claim, "are designed to further the due process of law that the Constitution guarantees." *Nelson v. Adams USA*, 120 S. Ct. 1579, 1584 (2000).

Because the Federal Rules of Civil Procedure embody the basic due process requirements for adjudicating civil cases in the Federal Courts and do so in a way that strikes a balance between the need for fair and reliable fact finding on the one hand and reasonable promptness in the resolution of civil disputes on the other, there are compelling reasons to follow those Rules in this context, and no reason not to. And, there can be no question in this case that neither the Federal Rules nor due process principles "countenance such swift passage from pleading to judgment in the pleader's favor," *Nelson*, 120 S.Ct. at 1584, as occurred here.

The Federal Rules—at their most irreducible minimum—require three procedural protections that were not afforded to APA, LaVoy, and Mayhew in the this case: (1) enough notice of the nature and particulars of the claim to afford a meaningful opportunity to respond, (2) sufficient time to prepare a defense to a claim, and (3) a reasonable opportunity for discovery.

The Federal Rules, first, contemplate that a party be apprised of the nature and particulars of a claim for relief asserted against that party. Whether measured by the motion standard of Rule 7(b)(1) (requiring a party to "state with particularity the grounds" for the relief sought) or the pleading standard of Rule 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"), that notice must at least permit the party against who the claim is made to prepare an adequate defense. *See Conley v. Gibson*, 355 U.S. 41, 58 (1957) (Federal rules require "fair notice of what the plaintiff's claim is and the grounds upon which it rests.").

The Federal Rules, furthermore, contemplate "time and opportunity to respond to" a claim. *Nelson*, 120 S. Ct. at 1584. In a civil case for damages allegedly caused by the defendant's completed acts, the Federal Rules set up a framework by which the litigation progresses toward a trial on the merits—beginning with an answer, then discovery, and then pretrial proceedings—and do not provide for a simple general notice on day one and an immediate dispositive liability hearing on day two.

By dispensing entirely with these minimum due process requisites—on no basis other than its misunderstanding that the civil contempt power in all its manifestations is "naturally 'summary in form and swift in execution'"—the Fifth Circuit's decision is incompatible with the fair and even-

handed administration of the law in a way that calls for this Court's correction.[16]

CONCLUSION

For the above stated reasons, this petition for a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully Submitted,

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[16] In the interest of completeness, and so that we neither overstate nor understate the ramifications of the major proposition we have argued—that compensatory civil contempt cases are in the class of civil damages cases and subject to the due process regime that governs that class of cases—we note that this proposition suggests that, in the Federal Courts, such cases are, by reason of the Seventh Amendment, subject to the protection of a jury trial. That suggestion depends not only on the foregoing proposition being judged to be correct but also on the complexities of characterizing, for Seventh Amendment purposes, actions different in kind from those known to Eighteenth Century England. *See, e.g., City of Monterey v. Del Monte Dunes, Ltd.*, 119 S.Ct. 1624 (1999); *Teamsters v. Terry*, 494 U.S. 558 (1990). Since the Court has not passed on the correctness of our submission; since the courts below rejected our submission without exploring a jury trial issue and that being so, no jury trial issue has been explored in the courts below; and since the issue has its own complexities, we merely put this place marker on it for the purpose of the proceedings in this Court.

ADDENDUM

Text of the District Court February 10, 1999 Temporary Restraining Order.

IT IS ORDERED, that the Defendants, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, or by and through their orders, are hereby temporarily restrained pending a hearing on the preliminary injunction in this matter:

(a) From calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing any interference with American's airline operations, including but not limited to any strike, work stoppage, sick-out, slowdown or other concerted refusals to fly over a minor dispute or otherwise in violation of the RLA, 45 U.S.C., §§ 151-188 (1988).

AND IT IS FURTHER ORDERED:

(b) That the said Defendants and said other persons acting in concert with them shall take all reasonable steps within their power to prevent the aforesaid actions, and to refrain from continuing the aforesaid actions if commenced.

(c) That the said Defendants shall instruct all pilots to resume their normal working schedule, and provide Plaintiff a copy of all such instructions.

(d) That APA and the individually named Defendants notify, by the most expeditious means possible, all APA-represented pilots employed by American of the issuance, contents and meaning of this Temporary Restraining Order, and produce a copy of all such messages to Plaintiff.

(e) That the notice described in (d) above include a directive from APA to those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist

all such activity and to cease and desist all exhortations or communications encouraging same.

(f) That APA and the individually named Defendants post the notice described in (d) above to APA's Internet web site, and provide a copy of the notice to the Plaintiff.

(g) That APA and the individually named Defendants include the contents of the ordering paragraphs of this Order on all recorded telephone hotlines under control of Defendants or any of them, until such time as the Court has acted on Plaintiff's Motion for a Preliminary Injunction, and provide a copy of all messages to the Plaintiff.

(h) That APA and the individually named Defendants report by 12:00 noon on February 12, 1999, by sworn affidavit, the methods used to effect the notice described in (d) above to all APA-represented pilots.

(i) All copies required to be furnished to the Plaintiff by Defendants under this Order shall also be contemporaneously furnished to the Court.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

ALLIED PILOTS ASSOCIATION,
RICHARD T. LAVOY,

and

BRYAN A. MAYHEW,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10814

AMERICAN AIRLINES INC.,
Plaintiff-Appellee,

v.

ALLIED PILOTS ASSOCIATION, RICHARD T. LAVOY, and BRIAN A. MAYHEW,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

September 21, 2000
As Revised September 27, 2000

Before WIENER, BENAVIDES and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Defendants-Appellants, Allied Pilots Association ("APA") and two of its officers, appeal an adjudication of civil contempt against them and an award of compensatory damages for that contempt. The district court awarded approximately $45.5 million dollars in compensatory damages after finding that defendants failed to carry out a temporary restraining order mandating that they call off a "sick out" by the pilot members of the APA. Defendants contest the evidence and the due process given in the district court's contempt and damage rulings and also argue that any

award of compensatory damages is inconsistent with the Railway Labor Act.

FACTUAL HISTORY AND PROCEEDINGS BELOW[1]

This saga began with American Airlines's ("American") acquisition of Reno Air, Inc. in December of 1998. Following the acquisition, American advised the APA that it intended to operate Reno Air separately for a transitional period due to legal, operational and business constraints that prevented instantaneous integration.[2] The APA, which is certified under the Railway Labor Act[3] to represent approximately 9,300 pilots employed by American, took the position that the newly-affiliated Reno Air flights should be flown in accordance with the existing Collective Bargaining Agreement ("CBA") between American and the APA. Specifically, the APA argued that American's operation of Reno Air with pilots not on American's Pilot Seniority List was in violation of the Recognition and Scope Clause of Section 1 of the CBA.[4] American refused to apply the CBA to the new affiliate. The APA contended that American's operation of Reno Air outside the CBA constituted a

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[1] The factual history of this case is thoroughly reported in the district court's July 23, 1999 Order. *See American Airlines, Inc. v. Allied Pilots Ass'n*, 53 F. Supp. 2d 909, 913-17 (N.D. Texas 1999).

[2] This proposed procedure was consistent with American's acquisition of Air Cal in 1987. Following that acquisition, American operated Air Cal as a separate carrier for a transitional period during which American and the APA successfully negotiated an agreement providing for the integration of the pilot workforces

[3] 45 U.S.C. § 151-88 (1994).

[4] Section 1 of the CBA is titled "Recognition and Scope." Section 1(C), titled "Scope," states as follows: "(1) General. All flying performed by or on behalf of the Company or an Affiliate shall be performed by pilots on the American Airlines Pilots Seniority List in accordance with the terms and conditions of the agreement." This language is identical to that contained in the CBA in place during American's prior acquisition of CalAir.

unilateral amendment to the CBA which, under the RLA, justifies self-help measures such as a strike or other job action. American took the position that the CBA did not immediately oblige it to apply its terms to Reno Air and that because the dispute with the APA involved contract interpretation,[5] it was a "minor" dispute under the RLA, thereby making unlawful any self-help action by the APA.

American and the APA negotiated for approximately two months without resolution. On February 5, 1999, a large number of the APA's pilot members began an unannounced sick-out. This illegal job action[6] resulted in an enormous number of flight cancellations due to lack of crew, which, in turn, cost American millions of dollars in lost revenues and affected hundreds of thousands of passengers throughout the country.

The sick-out began on February 6, 1999. From that day until February 9, 1999, over 1600 flights were canceled because of lack of crew. On February 10, 1999, American sought relief from the district court in the form of a

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[5] Despite American's willingness to do so, the APA failed to adhere to the CBA with regard to remedies for alleged violations of the Scope Clause in Section 1. Section 1.L of the CBA, titled "REMEDIES" provides, verbatim:

> (1) The Company and the Association agree to arbitrate any grievance filed by the other party alleging a violation of this Section 1 on an expedited basis directly before the System Board of Adjustment sitting with a neutral arbitrator. The arbitrator shall be a member of the National Academy of Arbitrators and experienced in airline industry disputes. The burden of proof will be determined by the arbitrator. The provisions of the Railway Labor Act shall apply to the resolution of any dispute regarding this Section 1.

[6] The parties have stipulated that the dispute leading up to this job action was a minor dispute under the RLA. *See American Airlines*, 53 F. Supp. 2d at 917 "Because it was a 'minor dispute,' Defendants were prohibited by the RLA from engaging in the sick-out as they did. The sick-out was thus an illegal job action.")

Temporary Restraining Order ("TRO"). At 4:00 p.m. (CST) on February 10 the district court signed the TRO. The TRO required the defendants and anyone working for or with them to take "all reasonable steps within their power" to prevent continuation or encouragement of the sick-out. The TRO also contained specific requirements: that the defendants "instruct all pilots to resume their normal working schedule," that the defendants notify all APA-represented pilots by the "most expeditious means possible" of the contents and meaning of the TRO, that the latter communication contain a directive "to cease and desist" the sick-out, that the communication be posted on the APA's web site, that the contents of the TRO ordering paragraphs be included on all telephone hotlines held by the APA, that the defendants report by noon on February 12, 1999, the methods used to effect the notice required by the TRO, and that copies of the notice and reports be furnished to American.

The district court found that the sick-out actually increased in size after the TRO was signed. On February 11, 1999, the day after the TRO was signed, over 1200 flights were canceled. That same day, American sought to hold the defendants in civil contempt for violating the TRO. After hearing evidence on American's contempt motion on February 12, 1999, the district court issued an Order of Contempt[7] in which the defendants were adjudged to be in civil contempt. In addition, a date was set for a hearing on the issue of compensatory damages for February17, 1999.

At the February 17, 1999 hearing, American presented evidence regarding the amount of damages it suffered as a

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[7] That unpublished order can be found at 1999 WL 66188 (N.D. Tex. Feb. 13, 1999). The district court also made findings of fact and conclusions of law at this hearing which can be found at 1999 WL 66168 (N.D. Tex. Feb. 13, 1999). Those findings and conclusions were adopted in toto in the district court's final opinion. *See American Airlines*, 53 F. Supp. 2d at 917 n.44.

result of the defendants' contemptuous conduct. The defendants did not present evidence, but moved for a continuance which the district [court] granted.

The hearing on damages reconvened on April 12, 1999, and was further continued until April 15, 1999. At the conclusion of the hearing, the district court announced its decision from the bench to award $45,507,280.00 in compensatory damages attributable to the defendants' conduct.

STANDARD OF REVIEW

We review contempt findings and damage awards for contempt for abuse of discretion. *See Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 46 (5th Cir. 1992); *see also Crowe v. Smith*, 151 F.3d 217, 226 (5th Cir. 1998) (noting that "review is not perfunctory" where "a district court's imposition of sanctions under its inherent power is involved"). The district court's underlying findings of fact are reviewed for clear error and its underlying conclusions of law reviewed de novo. *See Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir. 1987) (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 572(1985)).

DISCUSSION

I. Liability for Civil Contempt.

A. The District Court's Order.

To support a contempt finding in the context of a TRO, the order must delineate "definite and specific" mandates that the defendants violated. *See* Fed. R. Civ. P. 65; *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995). "An injunction must simply be framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 373 (5th Cir. 1981). The district court need not anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated. *See North Alamo Water*

Supply Corp. v. City of San Juan, 90 F.3d 910, 917 (5th Cir. 1996) ("Although this order does not choreograph every step, leap, turn, and bow of the transition ballet, it specifies the end results expected and allows the parties the flexibility to accomplish those results.").

The district court's TRO contained the following provisions:

> IT IS ORDERED, that the Defendants, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, or by and through their orders, are hereby temporarily restrained pending a hearing on the preliminary injunction in this matter:
>
> (a) From calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing any interference with American's airline operations, including but not limited to any strike, work stoppage, sick-out, slowdown or other concerted refusals to fly over a minor dispute or otherwise in violation of the RLA, 45 U.S.C., §§ 151-88 (1988).
>
> AND IT IS FURTHER ORDERED:
>
> (b) That the said Defendants and said other persons acting in concert with them shall take all reasonable steps within their power to prevent the aforesaid actions, and to refrain from continuing the aforesaid actions if commenced.
>
> (c) That the said Defendants shall instruct all pilots to resume their normal working schedule, and provide Plaintiff a copy of all such instructions.
>
> (d) That APA and the individually named Defendants notify, by the most expeditious means possible, all APA-represented pilots employed by American of the issuance, contents and meaning of this Temporary Restraining Order, and produce a copy of all such messages to Plaintiff.

(e) That the notice described in (d) above include a directive from APA to those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same.

(f) That APA and the individually named Defendants post the notice described in (d) above to APA's Internet web site, and provide a copy of the notice to the Plaintiff.

(g) That APA and the individually named Defendants include the contents of the ordering paragraphs of this Order on all recorded telephone hotlines under control of Defendants or any of them, until such time as the Court has acted on Plaintiff's Motion for a Preliminary Injunction, and provide a copy of all messages to the Plaintiff.

(h) That APA and the individually named Defendants report by February 12, 1999, by sworn affidavit, the methods used to effect the notice described in (d) above to all APA-represented pilots.

(i) All copies required to be furnished to the Plaintiff by Defendants under this order shall also be contemporaneously furnished to the Court.

Defendants argue that all of the specific requirements of the TRO were met. Our examination of this issue focuses on whether the general provisions of the TRO were sufficiently clear in what conduct they mandated and prohibited to support the contempt finding.

B. The Defendants' Efforts to Comply with the TRO.

According to the defendants' brief, LaVoy appeared before television cameras immediately after the TRO was issued saying that the APA would comply with the district court's order and asking APA members to return to work. The evening of February 10, LaVoy and Mayhew participated in a conference call with members of APA's Board of Directors.

On this conference call, Lavoy informed Mayhew and the Board of the TRO, told them that he would send out a message to members of the APA to begin compliance with the TRO as soon as possible, and told them that another conference call would be forthcoming to discuss such compliance after APA's counsel had an opportunity to review the TRO. According to the defendants, LaVoy "unequivocally" told the Board that any pilot fit to fly ought to return to his schedule.

That evening, at 7:30 p.m. (CST), LaVoy recorded a message on the APA's Information Hotline.[8] That message read in pertinent part:

> It is important to bear in mind that this order does not constitute a judgment on the merits of the contractual dispute and should have no effect on either side's bargaining power.
>
> Also, please be aware that where the courts [sic] order refers to "defendants," it is referring to APA's National Officers, Board of Directors, Negotiating Committee and General Counsel.
>
> * * *
>
> The Association will comply with the judge's order and plans to provide you, the membership, with more specific information about the order as soon as we have had an opportunity to complete our review.
>
> As we have emphasized throughout this dispute, we remain focused on negotiating an agreement that is good for all of the pilots involved in the Reno Air acquisition. Today's legal maneuvering by management does not bring us any closer to our goal of a negotiated settlement.

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[8] This message was also posted on the APA's web site. *See* <http://www.alliedpilots.org/pub/hotline/19990210.html> (visited July 17, 2000).

Following a review by counsel the next morning, LaVoy recorded a revised Hotline message,[9] which repeated the previous day's statements regarding management's legal maneuvering and that the TRO was not a judgment on the merits of the contractual dispute and quoted the full text of the TRO. In addition, the February 11 (sent at 1 p.m. (CST)) message contained the following statement immediately after the full quote of the TRO:

> That is the complete text of the order. Fellow pilots, the Allied Pilots Association and its officers do not authorize, ratify or condone any sick-out or slow down or violation of the prohibitions in the ORDER. We further instruct all pilots to resume their normal working schedule and to otherwise comply with Judge Kendall's February 10, 1999 order.

A similar statement, along with the text of the TRO, was distributed to all board and committee members with instructions to post the message on all domicile bulletin boards, to tell all pilots to resume their normal working schedules and to convey that the TRO prohibited a sick-out. In addition, a script for phone bank[10] volunteers was drafted.[11] This script instructed the volunteer to read the following statement:

> The Allied Pilot's Association and its officers do not authorize, ratify, or condone any sick out or slow down or violation of the prohibitions contained in the ORDER.

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[9] This message was also posted on the APA's web site. *See* <http://www.alliedpilots.org/pub/hotline/19990211.html> (visited July 17, 2000).

[10] The district court found that the Union ran a phone bank between February 7 and February 10 to call pilots and actively encourage them to call in sick. *See American Airlines*, 53 F. Supp. 2d at 922. This active process of notifying members was referred to in testimony as a "phone tree." See id. at n.69.

[11] Mayhew assisted in the drafting of this script

> We further instruct all pilots to resume their normal working schedule and to other wise comply with Judge Kendall's February 10, 1999 ORDER.

During the time between the issuance of the TRO (4 p.m., February 10, 1999) and late the following morning (February 11, 1999), the number of pilots on the sick list increased. American moved for a finding of contempt and an award of compensatory damages against the defendants on the afternoon of February 11. The district court issued an order requiring the defendants to show cause at a hearing at 10 a.m. on February 12, 1999, as to why they should not be held in contempt. The district court also scheduled a hearing regarding American's prayer for compensatory damages for February 16, 1999.

At the contempt hearing the district court heard testimony from an American vice president and from several APA witnesses called by American. Our review of the record shows that the questioning and discussion centered on the February 10, 1999, communications immediately following the issuance of the TRO. According to the defendants' brief and our review of the record, the district court asked the APA's representatives why they did not initiate a "phone tree"[12] and why they did not order APA, members, specific terms, to clear the sick list immediately and return to work.

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[12] Rather than set up the active "phone tree," the APA had set up a passive "phone watch" to notify members of the TRO's requirements. Testimony revealed that a "phone watch" is passive in the sense that the APA simply has people answering the phone when members call in for information. *See American Airlines*, 53 F. Supp. 2d at 922 n.68. The district court commented on this rather sudden switch in communication format:

> The evidence further demonstrates that although a phone bank (in the form of a "phone tree") was operational to cause the sick-out, at the time of the contempt hearing on February 12, 1999, one has not been established to call pilots to get them to stop. This is so

At approximately 4 p.m. (CST), following the February 12, 1999, contempt hearing, LaVoy placed yet another message (along with the text of the district court's order) on the APA's Hotline.[13]

> Before delivering the bulk of today's message, I want to make a personal plea to all of our pilots: the Association's leadership needs your help in complying with Judge Joe Kendall's Order. We need to get this airline back up and running at full capacity, and we need to do so quickly. Please clear the sick list immediately and resume your normal schedule. Again, APA is absolutely serious about doing all we can to comply with the judge's order, and APA's entire leadership is asking for your help in doing so.
>
> * * *
>
> That is the complete text of the order. Fellow pilots, I repeat, the Allied Pilots Association and its officers do not authorize, ratify or condone any sick-out or slow down or violation of the prohibitions in the order. Again, we further instruct our pilots to clear the sick list, resume your normal working schedule and to otherwise comply with Judge Kendall's February 10, 1999 order.

In addition, the APA started a "phone tree" and began actively calling pilots and telling them to clear the sick list and return to work.

> even though from the operation of the "phone watch," they had both the lines and the manpower to take this very reasonable action to end this illegal sick-out and comply with this Court's Order.

American Airlines, 53 F. Supp. 2d at 922 (footnotes omitted).

[13] This message was also posted on the APA's web site. *See* <http://www.alliedpilots.org/pub/hotline/19990212.html> (visited July 17, 2000). This message was distributed to the 6,350 pilots for whom the APA had e-mail addresses

C. Civil Contempt.

"A movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence: 1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court's order." *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992) (quoting *Petroleos*, 826 F.2d at 401). The contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order. *See N.L.R.B. v. Trailways, Inc.*, 729 F.2d 1013, 1017 (5th Cir. 1984).

D. Union and Individual Liability.

A union can be held in contempt "if the strike was conducted or encouraged by its members functioning as a union, by its agents acting within their apparent authority, or by those whose acts the union can be held to have ratified by its inaction." *Black Diamond Coal Mining Co. v. Local Union 8460*, 597 F.2d 494, 495 (5th Cir. 1979). "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." *United States Steel Corp.*, 598 F.2d at 365; *see also Black Diamond Mining*, 597 F.2d 495 ("[T]he circumstances surrounding the strike may create an inference that the Union condones or ratifies the illegal activity and the Union will be held responsible by its failure to take measures to end the strike."). We find that the district court did not abuse its discretion in concluding that the APA ratified the illegal job action, and therefore, was in contempt of the TRO.

The conduct of LaVoy and Mayhew failed to bring the APA into compliance with the TRO.[14] They are therefore

[14] It is important for us to note that we are not setting up an unreasonable standard for future labor litigants. LaVoy and Mayhew are not being held responsible for their failure to get the workers back to

responsible for the APA's disobedience of the TRO. As executive officers of the APA, LaVoy and Mayhew are subject to contempt charges for their failure to cause the APA to comply with the district court's order. *See Wilson v. United States*, 221 U.S. 361, 376-77 (1911); *see also N.L.R.B. v. Maine Caterers, Inc.*, 732 F.2d 689, 691 (1st Cir. 1984) ("[A]n officer, responsible for the corporation's efforts and for its disobedience, may be held in contempt."). The district court's conclusion that LaVoy and Mayhew are subject to contempt charges for their acts (or omissions) in this illegal job action was not in error.

E. The Defendants Violated the TRO.

The district court found that the defendants' February 10, 1999, communication violated sections (a) thru (g) of the TRO. *See American Airlines*, 53 F. Supp. 2d at 917-23. The district court's factual findings with regard to Defendants' efforts to comply with the TRO on February 10, 1999, are not clearly erroneous. The district court also found that the appellants' February 11, 1999, communication violated sections (a), (b), (d), (e) and (f) of the TRO. The district court's factual findings with regard to appellants' efforts to comply with the TRO on February 11, 1999, are not clearly erroneous. For the reasons that follow, we find that the district court did not abuse its discretion in finding the defendants in civil contempt for violating the TRO.

1. The TRO's "all reasonable steps" requirement.

Section (b) of the TRO clearly required the APA to "take all reasonable steps" to end or prevent the sick-out. Our review of the district court's order and the record lead us to conclude that is was not clearly erroneous for the district court to hold that this portion of the TRO, inter alia, was not

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work, but for their failure to use their best efforts to effectuate the APA's compliance with the TRO.

satisfied until 4 p.m. (CST) on February 12, 1999. We agree with the district court's finding that the February 10 communication did not purge the defendants of contempt due to the fact that the communication was so lacking in authoritative forcefulness that [it] either [was] not heard at all . . . or [was] discounted as being merely stage lines parroted for the benefit of some later judicial review.

United States Steel v. United Mine Workers of America, 598 F.2d 363, 366 (5th Cir. 1979), quoted at *American Airlines*, 53 F.Supp. 2d at 921-22.

The district court's finding that the February 11 communication also failed to satisfy the "all reasonable steps" portion of the TRO is also not clearly erroneous. Like the February 10 communication, the February 11 communication was a minimalist, non-authoritative directive that was merely accompanied by a verbatim quotation of the TRO.

The district court's conclusions that the February 10 and 11 communications did not constitute "all reasonable steps" by the APA are bolstered by additional documents in the record prior to the district court's issuance of the TRO on February 10, 1999.[15] This evidence is a series of e-mails showing that APA representatives forewarned pilot members that a federal injunction may be forthcoming, but that the pilots should not feel compelled to return to work immediately. The final transmission, dated February 5, 1999, was written by Los Angeles APA Chairman Denny Breslin and contained the following statements:

> This is the time of the year when colds, flu and viruses abound. In addition to the normal health concerns, the stress and distraction due to our current contract dispute

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[15] The printouts of the e-mails were attached to American's "Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order and Injunctive Relief," filed with the district court on February 9, 1999.

appears to be taking its toll. As an organization dedicated to safety, we cannot tolerate any degradation of safety within our cockpits.

* * *

Captains, please make every effort to ensure that your crew is not emotionally distracted in any way. Please don't engage in discussion in the cockpit that could cause a safety hazard. If you decide that you are unfit to fly your next trip, and MOST pilots probably are, then you should contact crew schedule immediately to let them know you are SICK. You are not required to state the nature of your illness, and do not allow yourself to be dragged into a discussion about it.

* * *

Our intention is to vigorously defend any pilots' [sic] right to use their sick leave appropriately.

It is possible that a Federal Judge will enjoin the APA from an alleged illegal job action. If that happens it does NOT mean that you, as an individual, may return to work if you still feel too stressed to perform safely in the cockpit. Remember the FAA has given YOU the final determination whether or not you are fit for flying duty.

This evidence, in front of the district court prior to its issuance of the TRO, strongly supports the district court's finding that the communications of February 10 and 11 did not constitute "all reasonable steps" to prevent or otherwise stop the sick-out. Indeed, it strongly implies that the intention of the APA and its leaders[16] from the outset was to instigate the very illegal job action that took place.

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[16] Although there was originally some question as to whether the Union formally organized the sick-out, counsel for defendants later admitted that they had a hand in organizing the illegal work action. *See American Airlines*, 53 F. Supp. 2d at 922 n.71 (describing as "troubling" this

2. The TRO's "cease and desist" requirement.

Section (e) of the TRO required the APA to issue "cease and desist" directives to pilots engaging in the sick-out. A plain reading of the February 10 and 11 communications shows that neither communication contained a direction to stop the sick-out. The February 11 addition to the communication that the "pilots resume their normal working schedules" is "so lacking in authoritative forcefulness" that it did little if anything to halt the sick-out. As stated above, the number of APA pilots on the sick list actually increased in size on February 11.

3. Defendants did not Purge Themselves of Contempt Until February 12.

We find that the district court's conclusion that defendants failed to purge themselves of contempt via the February 10 and 11 communications was not clearly erroneous. Significant evidence from our review of the record shows that it was not until February 12, 1999, at 8 p.m. (CST), that LaVoy finally took action, on behalf of the APA, sufficient to purge the defendants of contempt.

F. Due Process and the District Court's Contempt Proceedings.

Defendants argue that they were entitled to more process than they received during the contempt phase of this proceeding. As primary authority for this assertion, the defendants assert that the standard applied in *International Union, UMWA v. Bagwell*, 512 U.S. 821 (1994), should apply in the situation *subjudice*. We decline the invitation to apply the principle enunciated in *Bagwell* to civil contempt situations.

"complete 180 degree turn from what had earlier been stated to the Court on the record in open court by LaVoy and defendants' counsel").

Contempt proceedings are naturally "summary in form and swift in execution." *Ryals v. United States*, 69 F.2d 946, 947 (5th Cir. 1934). The defendants' argument that they are entitled to what amounts to a full trial on the merits of their contempt charge is contrary to case law. *See, e.g., Placid Refining Co. v. Terrebonne Fuel & Lube*, 108 F.3d 609, 613-14 (5th Cir. 1997) (holding that civil contempt proceeding that gave "notice and an opportunity to be heard" was constitutional), *accord Alberti v. Klevenhagen*, 46 F.3d 1347, 1359 (5th Cir. 1995).

The defendants had adequate notice of the contemptuous acts or omissions alleged by American. American's Motion for Contempt asked the district court to hold the defendants in contempt because (1) the sick list increased in number after the issuance of the TRO; (2) the messages on the Hotline and the Internet were not in compliance with the TRO's mandates; and (3) the defendants did not take "all reasonable steps within their power to" prevent continuation of the sick-out.

We find that the allegations in American's Motion for Contempt provided the defendants adequate notice to inform them of the nature of the charges and to enable them to prepare a defense. "Simple notice is all that is required." *United States v. Powers*, 629 F.2d 619, 625 (9th Cir. 1980). Couple this with the district court's Show Cause Order[17] and the record shows that defendants were provided with all the notice necessary under the Due Process Clause.

Defendants also argue that the district court's decision to allow American to expand the record after the February 12 hearing without giving defendants an opportunity to confront

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[17] The district court's "Order to Show Cause" advised the defendants to appear on February 12 and "show cause, if any there be, why they should not be adjudged in civil contempt of this Court, and why the Court should not impose fines on Defendant APA and individual named Defendants, as prayed in the Motion of Plaintiff."

this new evidence violated their right to due process. As noted in our discussion of the defendants' violations of the TRO, the February 10 and 11 communications along with the series of e-mails forewarning the pilot members of impending court action (all of which were in front of the district court prior to its issuance of the TRO) provide sufficient evidence that the defendants' actions did not comply with the spirit or letter of the TRO. Therefore, any discussion of the post-February 12 evidence is unnecessary and moot.

II. "Compensatory Damages" for Civil Contempt.

A "Compensatory Damages" Under the RLA vs. "Compensatory Damages" for Violation of a Court Order.

In this circuit, American may not recover from the APA or its representatives under the RLA for damages caused by illegal strikes due to "minor disputes." *See Burlington Northern Rail. Co. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86, 88 (5th Cir. 1992) (Wisdom, J.); *Louisville & Nashville Rail. Co. v. Brown*, 252 F.2d 149, 154-55 (5th Cir. 1958). The analysis in Brown focused on the fact that Congress did not specifically note in the RLA that damage remedies were available. See 252 F.2d at 155. Importantly, this analysis did not hold that district courts were stripped of their contempt remedies by the RLA.

There is a difference between a damage action by an employer for harm resulting from an illegal strike and a compensatory sanction issued by a court for disobedience of its mandates[18]. With the compensatory sanction, the end result is largely the same as an action for damages—the

[18] This point was also not lost on the district court. *See, e.g., American Airlines*, 53 F. Supp. 2d at 941 n.182 ("The money is not being ordered paid because of the illegal work stoppage, but for the damages caused by not ending it when ordered to do so by a federal court.").

employer is compensated. *See, e.g., Chandler v. James*, 180 F.3d 1254, 1270 (11th Cir. 1999) ("Compensatory sanctions merely imitate the relief that would be provided in a damages action."). However, the justification for the sanction is different than that for the damage action. The district court recognized this distinction in its articulation of the controversy in this case:

> The basic controversy in this case is whether the APA was engaged in an illegal job action under the RLA and whether they should be ordered to stop via a TRO and Injunction after a hearing. The basic controversy was resolved in favor of American when the Court found and the APA stipulated that this was a "minor dispute" under the RLA, thus making the APA instigated sick-out an illegal job action under the RLA. Furthermore, the parties have now asked the Court to enter an agreed injunction. If the TRO had been obeyed, the APA would not owe a dime because damages are not available under the RLA. But the Defendants are liable for damages because of their contemptuous acts of not obeying and ending the illegal sick-out when ordered.

American Airlines, 53 F. Supp. 2d at 939-40. In short, the sanction was issued in this case to compensate American for the damages caused by the defendants' violation of the TRO, not a violation of the RLA.

"Judicial sanctions in civil contempt proceedings, may in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947); *see also Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir. 1976) ("Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of his adversary's noncompliance."), *accord Travelhost*, 68 F.3d at

961-61; *Petroleos*, 826 F.2d at 400. Because the contempt sanction in this case was ordered to compensate American for lost revenue resulting from the defendants' contemptuous conduct, it is clearly compensatory in nature.[19]

The district court "has broad discretion in the assessment of damages in a civil contempt proceeding." *Long Island Rail. Co. v. Brotherhood of Rail. Trainmen*, 298 F. Supp. 1347, 1347 (E.D.N.Y. 1969). "The purpose is to compensate for the damages sustained. The public rights that the said court orders sought to protect are important measures of the remedy." *Id.* (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)). In this case the sanction issued by the district court sought to protect the sanctity of judicial decrees and the legal process. *See McComb*, 336 U.S. at 193 ("The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief."). "In our complex society, there is a great variety of limited loyalties, but the overriding loyalty of all is to our country and to the institutions under which a particular interest may be pursued." *United Mine Workers*, 330 U.S. at 306. The district court did not abuse its discretion in deciding to award American compensatory damages for the injuries caused by the defendants' civil contempt.

B. Due Process and "Compensatory Damage" Proceedings.

Our review of the record in this case demonstrates that the issue of damages is indeed a complex one. Given the fact that the damages are not susceptible to simple quantification, we must ensure that careful procedures were used to ascertain

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[19] In its April 12, 1999, hearing on compensatory damages, the district court was emphatic in using the civil contempt terminology and in proclaiming that any damages paid by the APA were going directly to American. "While the district court's characterization is certainly not controlling, it can be considered." *Petroleos*, 826 F.2d at 399 n.11 (citations omitted).

the amount appropriate to compensate American and to vindicate the district court's authority to demand adherence to its orders. We find that the district court did not abuse its discretion during the damage phase of its contempt proceeding as it addressed the issue with adequate procedural vigilance.[20]

At the February 17, 1999, hearing, American presented its case-in-chief which relied heavily on expert testimony. The defendants were allowed to cross examine the experts, but were not given advance notice of the experts' reports or allowed to depose the experts. When American was finished presenting its case, the defendants requested a continuance to develop their defense. The district court granted the defendants' request and continued the damages phase of its contempt hearing until mid-April. At this subsequent hearing, defendants were again allowed to cross examine the plaintiff's experts and were allowed to present their other evidence. The extension of time allowed the defendants more than adequate time to develop their arguments regarding the damages caused by their conduct.

The defendants' brief discusses at length only one specific example of how the district court purportedly violated their due process rights in the damages hearing: the so-called "truncated discovery process." The manner in which the district court tailored the discovery to the particular demands of the damages phase of this case was well within its discretion in this particular case. *See, e.g., Munoz v. Orr*, 200 F.3d 291, 305 (5th Cir. 2000). In our view, defendants have not demonstrated how additional discovery would shed any significant amount of light on the issue.

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[20] Consistent with our due process analysis with respect to the liability phase of the civil contempt proceeding, we decline to adopt a procedural requirement in civil contempt sanction hearings akin to that set forth in Bagwell.

Our review of the record reveals no evidence of inadequate due process during the damage phase of this trial. The procedural framework set up by the district court was sufficient for all parties to develop their respective damage cases. Both sides presented complex damage models that involved expert testimony and industry document analysis. Based on the testimony of American's damage experts, inter alia, the district court determined that American's overall loss caused by the work stoppage were somewhere between $200 to $250 million.[21] The basis of the district court's compensatory damage award was the actual damages suffered during the two days the APA was in contempt. This amount, approximately $51 million, was reduced another 11 percent for the margin of error in American's revenue estimation and "booking away" that may have occurred.[22] Any additional time and proceedings would serve to prolong this unfortunate incident and would not benefit anyone.

The district court's decision to continue the damages hearing and tailor the discovery process in the manner it chose was not an abuse of discretion.

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[21] The district court ultimately found the testimony of APA's damage model experts contradictory, *see American Airlines*, 53 F. Supp. 2d at 935 (finding that the two APA experts differed with each other on the harm suffered by American by a factor of six and differed on the amount of damages for the two days by a factor of two), and unreliable. See id. (finding the assumptions that formed the basis for their calculations were "inconsistent with the obligations imposed on Contemnors by the TRO and the reality of the pilots' actions as evidenced by their conduct once they were directed to return to work on February 12"). These findings by the district court are not clearly erroneous.

[22] Booking away is a phenomenon that occurs when passengers become aware of the fact that there is some sort of job action going on at American, then those whose tickets permit them the flexibility to change their reservations, change them to another airline because of potential disruption of service at American.

CONCLUSION

For the aforementioned reasons, we AFFIRM the district court's ruling on the defendants' liability for civil contempt. We also AFFIRM the district court's determination of damages for that civil contempt.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS,
WICHITA FALLS DIVISION.

AMERICAN AIRLINES, INC.,
Plaintiff,

v.

ALLIED PILOTS ASSOCIATION, *et al*,
Defendants.

No. 7:99-CV-025-X.
Feb. 13, 1999.

KENDALL.

ORDER OF COMTEMPT

Unfortunately, the radical element that appears to be in control of the Allied Pilots Association ("APA" or "Union") seems determined to fly American Airlines ("American" or the "Company") into the side of the mountain, taking themselves, the Company, their co-workers and their customers with them. And all over what is legally a minor dispute under the Railway Labor Act and what Union President Richard Lavoy admitted under oath was only a difference in opinion of Reno Air transition time of 4 months. Lavoy testified that the transition will take 18 months and the Company projects that it will take 22 months. The Union believes this is a big enough deal to cost the Company millions, ruin the week for by now a half million people, and cost them untold millions and millions of dollars in damages. The ridiculousness of this is only surpassed by its outrageousness.

The Court recognizes that it would be wrong to paint all American pilots with the same brush. There are thousands of American pilots who want to fly, despite this dispute. And they are not scabs, but persons of honor who won't lie and sick-out and who have enough common sense to know this activity is not in their or their Union's long term best interest. They are being held hostage like everyone else and they need to remember this fiasco the next time they have Union elections.

If a federal court enters an order and it is disobeyed, to preserve the authority of the judicial branch of government, the court must compel obedience within the bounds of the law. There is no federal judge in this country who would do otherwise.

What the Union leaders described as "legal maneuvering" is really a complaint about being held accountable for their actions. Unions and management don't only interface at the bargaining table. When, as here, where one side is breaking the law, courts must intervene. Furthermore, courts have been in existence for centuries to compel parties to live up to their agreements. This case presents nothing new or novel in that regard.

What are we talking about here? Not a rule some "liberal" federal judge dreamed up, but an act of Congress to control labor disputes in the transportation industry because of its importance to national commerce. This act, the Railway Labor Act, has been on the books for over seventy years and upheld by the U.S. Supreme Court for decades. The gist of this law is that for Unions in the transportation industry, they must bargain in minor disputes like this one, not disrupt interstate commerce as this Union has.

This illegal sick-out by the Union has cost untold millions of dollars in damages to hundreds of thousands of passengers and businesses in this country. American Airlines may or may

not be right in the underlying labor dispute, but it is crystal clear the Company is not responsible for the canceled flights, passenger inconvenience, and monetary damages passengers have suffered. The Union is responsible for the damages these passengers have suffered. It is also clear that the Union leadership could care less about these people.

It is this Court's view that a minor labor dispute has been transformed into nothing more than a shakedown. Even though it may indeed be more economical for American to cave in and pay, in the long run, if you pay extortion today, you typically have to pay it tomorrow. When the pitch is "pay us what we want or we will cost you more,". it is the type of negotiation one usually sees when doing business with one of the five families in New York.

Of the pilots who testified, all make in excess of six figures. They make this while working about 78 hours per month, with a maximum of 100 hours per month. President Richard Lavoy and Vice-President Brian Mayhew testified that they work primarily on union business and made $260,000 and $220,000 last year respectively. Both of them, like about half of the pilots who testified, were taught to fly jets at taxpayer expense in the U.S. military, which of course enables them to earn their six figure incomes. When you realize this dispute is about the pilots wanting more money retroactively for flying the same airplanes to the same places merely because American bought a small airline many have never heard of, and you have been sleeping on the floor with your kids for a couple of days in some airport 1500 miles from home, it is hard to see the pilots as being mistreated.

No one can make someone else go fly an airplane. Particularly if someone is dishonest and willing to lie and say they are sick when they really aren't. Despite all the macho chest beating and mouthing off by anonymous pilots, I have never made that claim. But what a federal judge can do, and what I will do, is make people pay for what they break. So if

the activity and consequent damages continue, when all the dust clears, all the assets of the Union, including their strike war chest, will be capable of being safely stored in the overhead bin of a Piper Cub.

For the reasons set forth in this Court's Findings of Fact and Conclusions of Law, filed this same date, and for the reasons found in the record in this case, American Airlines' motion for contempt is GRANTED. With respect to the individual defendants who did not appear, the contempt action as to them is severed, and I will deal with them later. RICHARD LAVOY AND BRIAN MAYHEW are hereby HELD IN CIVIL CONTEMPT OF COURT. As to all other individual defendants who appeared and testified on February 12, 1999, they are not held in contempt of court. THE UNION, THE ALLIED PILOTS ASSOCIATION, is hereby HELD IN CIVIL CONTEMPT OF COURT.

THEREFORE, THE ALLIED PILOTS ASSOCIATION, UNION PRESIDENT RICHARD LAVOY, AND UNION VICE-PRESIDENT BRIAN MAYHEW ARE JUDGED GUILTY OF CIVIL CONTEMPT OF COURT.

Civil contempt serves the purpose of coercing a contemnor into complying and to compensate for damages resulting from the contemnor's past non-compliance. After carefully considering available alternatives, in order to achieve the purposes of civil contempt and to do justice in this case, the Court hereby assesses as a fine an amount of money that will compensate American Airlines for damages suffered as a result of canceled flights. Given the action and inaction of the evening of February 10 and the morning of February 11, coupled with the lead time needed to get this airline back on track, the Court deems the losses from this contemptuous conduct to be significant. Since civil contempt is also coercive in nature, the Court, in the interest of justice, reserves the right to remit the amount of the fine in the future.

At this time, actual damages are not clear. The Court will hold a hearing in Dallas, Texas at 9:30 a.m. on Wednesday, February 17, 1999 to allow presentation of evidence on this issue and then will calculate what the appropriate fine, under all the circumstances, should be.

From evidence that it is in the record, it is clear that damages from the canceled flights will be substantial. From the Court's understanding, it will be eight figures. The Court is going to require the defendants to pay a conservative amount of money, much less than the probable actual damages, into the Registry of the Court pending resolution of the amount necessary to reimburse the aggrieved party for the amount of money lost because of the contemnor's conduct.

THEREFORE, IT IS ORDERED that by 12:00 noon on Tuesday, February 16, 1999, the below defendants will pay into the Registry of this Court the following amounts of money to pay toward the compensatory civil contempt fine likely to be ordered in this case:

ALLIED PILOTS ASSOCIATION:	$10,000,000
RICHARD LAVOY	$ 10,000
BRIAN MAYHEW	$ 5,000

Of course, if a smaller fine is assessed, for whatever reason, the balance will be remitted.

The hearing set for February 16, 1999 at 9:30 a.m. on the issue of compensatory damages is continued until 9:30 a.m. on Wednesday, February 17, 1999.

APPENDIX C

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS,
WICHITA FALLS DIVISION.

AMERICAN AIRLINES, INC.,
Plaintiff,

v.

ALLIED PILOTS ASSOCIATION, *et al*,
Defendants.

No. 7:99-CV-025-X.
Feb. 13, 1999.

KENDALL.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing the evidence presented at the hearing on February 12, 1999 on Plaintiff's Motion to hold Defendants in contempt of court for having violated this Court's Temporary Restraining Order signed by this Court on February 10, 1999, and after having considered the pleadings and other materials on file herein, and after having heard the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

1. Any below-listed Conclusion of Law which should more properly be listed as a Finding of Fact is hereby incorporated by reference and adopted as a Finding of Fact.

2. All Findings of Fact are made by the Court, as the fact finder, by clear and convincing evidence, after assessing the credibility of witnesses called.

3. The Court finds that a Temporary Restraining Order was signed by the Court on February 10, 1999 (the "TRO") after both Plaintiff and Defendants had an opportunity to be heard in this Court on the issues presented therein. The Defendants subject to the TRO were therefore aware of and knew of the TRO. Counsel for the Defendants and Plaintiff conferred with the Court regarding the language and meaning of the TRO before its entry at 4 p.m. on February 10, 1999. The Court found the underlying labor dispute to be a minor dispute.

4. The Court finds that the Allied Pilots Association ("APA" or "Union") was informed by the Court in open Court on February 10, 1999 and through the issuance of the TRO that American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease. Union President Richard Lavoy stated in open court that the Union would comply.

5. The Court finds that the TRO contained the following provisions:

> "that the Defendants, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, or by and through their orders, are hereby temporarily restrained pending a hearing on the preliminary injunction in this matter:
>
> (a) From calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing any interference with American's airline operations, including but not limited to any strike, work stoppage, sick-out, slowdown or other concerted refusals to fly over a minor dispute or otherwise in violation of the RLA, 45 U.S.C., §§ 151-188 (1988).

AND IT IS FURTHER ORDERED:

(b) That the said Defendants and said other persons acting in concert with them shall take all reasonable steps within their power to prevent the aforesaid actions, and to refrain from continuing the aforesaid actions if commenced.

(c) That the said Defendants shall instruct all pilots to resume their normal working schedule, and provide Plaintiff a copy of all such instructions.

(d) That APA and the individually named Defendants notify, by the most expeditious means possible, all APA-represented pilots employed by American of the issuance, contents and meaning of this Temporary Restraining Order, and produce a copy of all such messages to Plaintiff.

(e) That the notice described in (d) above include a directive from APA to those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same.

(f) That APA and the individually named Defendants post the notice described in (d) above to APA's Internet web site, and provide a copy of the notice to the Plaintiff.

(g) That APA and the individually named Defendants include the contents of the ordering paragraphs of this Order on all recorded telephone hotlines under control of Defendants or any of them, until such time as the Court has acted on Plaintiff's Motion for a Preliminary Injunction, and provide a copy of all messages to the Plaintiff."

6. The Court finds that at 7:30 p.m. Central Standard Time on February 10, 1999 (3 1/2 hours after the Court's Order),

Richard Lavoy, President of the Union, sent out on the "APA Information Hotline" and posted on the Internet a message (the "February 10 communications") which was unreasonable under the circumstances and which was wholly inadequate and non-compliant with the TRO. This message was drafted, in part, by Union Vice-President Brian Mayhew.

7. The Court finds that the February 10 communication intentionally gave the impression and further conveyed to the Union membership that individual Union members did not have to comply with the TRO. As such, the Court finds that the February 10 communication violated Section (a) of the TRO in that it "permitted," "authorized," and "encouraged" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. This was done by specifically stating that only the Union and the individual defendant Union leaders were "Defendants," thus sending the clear message that individual Union members were not covered.

8. The Court finds that the February 10 communication violated Section (b) of the TRO in that it did not represent the taking of all "reasonable steps within [Defendants'] power to prevent" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. Counsel argued that the Union had until 12:00 Noon on February 12 to comply. This is not true. By simply reading the TRO, it is clear that deadline was for a report to the Court of the Union's actions to get flight operations back to normal.

9. The Court finds that the February 10 communication violated Section (c) of the TRO in that it did not "instruct all pilots to resume their normal working schedule ..."

10. The Court finds that the February 10 communication violated Section (d) of the TRO in that it did not "notify, by the most expeditious means possible, all APA-represented pilots employed by American of the ... contents and meaning" of the TRO. Again, it was made clear to the Union that the

issuance of the TRO meant that American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease.

11. The Court finds that the February 10 communication violated Section (e) of the TRO in that it did not "include a directive from APA to those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same."

12. The Court finds that the February 10 communication violated Section (f) of the TRO, as it is the Court's understanding that the February 10 communication was posted verbatim on the APA's Internet web site.

13. The Court finds that the February 10 communication violated Section (g) of the TRO, as all of the ordering paragraphs of the TRO were not contained in the February 10 communication.

14. The Court finds that the steps taken by the Union to comply with the TRO on February 10, 1999 were foreseeably ineffective and would only give the impression and further convey to the Union membership that individual Union members did not have to comply with the TRO. As what should have been a surprise to no one, the sick-out actually increased. The Court finds not only that this result was foreseeable, it was intended.

15. The Court finds that the unlawful sick-out of APA pilots subsequent to the issuance of the TRO continued and actually increased in numbers, all in direct violation of the TRO.

16. The Court finds that the aforementioned violations of the TRO amount to a ratification of the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or

encouragement may be inferred." *United States Steel Corp. v. United Mine Workers of America, Dist. 20*, 598 F.2d 363, 365 (5th Cir.1979), *reh'g denied*, 605 F.2d 555 (1979). The Court so finds ratification by the Union of the continued unlawful sick-out and charges the Union with responsibility for allowing the continued unlawful sick-out to continue in direct violation of this Court's TRO.

17. The Court believes language from *United States Steel Corp. v. United Mine Workers of America, Dist. 20*, 598 F.2d 363 (5th Cir.1979), reh'g denied, 605 F.2d 555 (1979) is appropriately quoted here because of the language's applicability to this matter:

> The "return-to-work directives [are] 'so lacking in authoritative forcefulness that they either were not heard at all . . . or were discounted as being merely stage lines parroted for the benefit of some later judicial review.' " *United States Steel Corp.*, 598 F.2d at 366.

The Court finds that the February 10 communication was "so lacking in authoritative forcefulness that [it] either [was] not heard at all ... or [was] discounted as being merely stage lines parroted for the benefit of some later judicial review." *Id.*

18. The Court finds that the Union's efforts on February 11, 1999, as evidenced in the Declaration of Richard T. Lavoy, filed on February 12, 1999, came too little too late and that the flouting of this Court's TRO by the Union on February 10, 1999 by virtue of the February 10 communication has led to the continued unlawful sick-out in increased numbers in direct violation of this Court's TRO.

19. The Court finds there is nothing said in the February 11, 1999 communication that was not known to the Union, its leadership, and counsel that could not have been said in the February 10 communication.

20. The evidence demonstrates and the Court finds that the Union ran a phone bank between February 7 and February 10 to call pilots and encourage them to call in sick when in fact they were not sick for the express purpose of economically damaging American Airlines (testimony of Captain Foster). This amazingly candid, and damaging, testimony confirmed what common sense already compelled: that this illegal sick-out was instigated by the Union and was not "spontaneous" as had been represented to the Court. This illegal activity, as admitted by this Union leader, was Union orchestrated, instigated, and driven, and continues to be so. It is the Union who is responsible for the consequent damages. Logic would thus dictate the Union could stop it if they chose to. At this point, they sadly have not.

21. The evidence further demonstrates that although a phone bank was operational to cause the sick-out, one has not been established to call pilots to get them to stop. This is so even though from the operation of the "phone watch," they have both the lines and manpower to take this very reasonable action to end this illegal sick-out and comply with this Court's Order.

22. The majority (12) of the individual defendant union leaders were on sick status at the time of the contempt hearing. They were not present for the hearing. The Court finds that this sends a loud and clear message to the rank and file members of the Union as to how seriously the membership should take the Court's Order and how seriously they should take the Union's judicially ordered statements to return to work.

23. As to the individual defendants, the Court finds and believes from the evidence that Union President Richard Lavoy and Vice-President Brian Mayhew could immediately end this sick-out and get American Airlines operational again if they chose to. The Court further finds that they are the

individual defendants responsible for the February 10 communication and thus the APA's disobedience of the TRO.

B. CONCLUSIONS OF LAW

1. Any above-listed Finding of Fact which should more properly be listed as a Conclusion of Law is hereby incorporated by reference and adopted as a Conclusion of Law.

2. "An order issued by the Court with jurisdiction over the subject matter and person must be obeyed until it is reversed." *United States Steel Corp. v. United Mine Workers of America, Dist. 20*, 598 F.2d 363, 368 (5th Cir.1979), reh 'g denied, 605 F.2d 555 (1979).

3. "The party seeking the contempt adjudication bears the burden of establishing the defendant's violation by clear and convincing evidence." *Black Diamond Coal Mining Co. v. Local Union # 8460, United Mine Workers of America*, 597 F.2d 494, 496 (5th Cir.1979).

4. This is a civil contempt proceeding. "The movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence: (1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order. Wilfulness is not an element of civil contempt. After the movant has shown a prima facie case, the respondent can defend against it by showing a present inability to comply with the subpoena or order." *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir.1987) (emphasis original) (citations omitted). The Plaintiff has met its burden in this matter by clear and convincing evidence.

5. A fine for civil contempt is a means to enforce a court order of injunctive relief, which in this case is the TRO. A fine for civil contempt may be compensatory in nature or may be designed to coerce behavior. To give a court the power to

issue injunctive relief without the power to fine those individuals who disobey the court order is to give a court the power to grant a remedy without effective means to enforce it. When the gauntlet is thrown down to the authority of the Court and its lawful orders, the Court has no choice but to pick it up.

6. A court can issue fines to enforce injunctive relief, including a TRO.

7. "The Court has broad discretion in the assessment of damages in a civil contempt proceeding. The purpose is to compensate for the damages sustained." The public rights that a court order seeks to protect are important measures of the remedy. *See Long Island Rail Road Co. v. Brotherhood of Railroad Trainmen*, 298 F.Supp. 1347, 1350 (E.D.N.Y.1969).

8. A union can be held in contempt "if the strike was conducted or encouraged by its members functioning as a union, by its agents acting within their apparent authority, or by those whose acts the Union can be held to have ratified by its inaction." *Black Diamond Coal Mining Co. v. Local Union # 8460, United Mine Workers of America*, 597 F.2d 494, 495 (5th Cir.1979). The same reasoning applies, as here, in an illegal sick-out job action.

9. "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." *United States Steel Corp. v. United Mine Workers of America, Dist. 20*, 598 F.2d 363, 365 (5th Cir.1979), *reh'g denied*, 605 F.2d 555 (1979). The "circumstances surrounding the strike may create an inference that the Union condones or ratifies the illegal activity and the Union will be held responsible by its failure to take measures to end the strike." *Black Diamond Coal Mining Co. v. Local Union # 8460, United Mine Workers of America*, 597 F.2d 494, 495 (5th Cir.1979). The APA Union

is directly responsible for the damages suffered and for disobedience to this Court's lawful Order.

These findings of fact and conclusions of law are hereby adopted and made as the findings of fact and conclusions of law of this Court.

APPENDIX D

UNITED STATES DISTRICT COURT,
N.D. TEXAS,
WICHITA FALLS DIVISION

AMERICAN AIRLINES INC.,
Plaintiff,

v.

ALLIED PILOTS ASSOCIATION,

and

RICHARD T. LAVOY, its President

and

BRIAN A. MAYHEW, its Vice President, et al.,
Defendants.

No. 7:99-CV-025-X.

June 23, 1999

MEMORANDUM OPINION (CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW) AND CONTEMPT AND DAMAGE ORDER

KENDALL, District Judge.

On February 13, 1999, the Court granted Plaintiff American Airlines, Inc.'s ("American") motion for civil

contempt of court[1] against Defendants Allied Pilots Association ("APA"),[2] Union president Richard LaVoy ("LaVoy"), and Union vice-president Brian Mayhew ("Mayhew").[3] These Defendants were held in civil contempt of court, after an evidentiary hearing, for violating a Temporary Restraining Order entered on February 10, 1999 (the "TRO").[4]

As will be discussed more fully below, this Court has no choice but to hold Defendants APA, LaVoy, and Mayhew responsible for their contemptuous actions in violating this Court's TRO and to hold them accountable for the financial loss their actions caused. By their deliberate and contemptuous actions, these Defendants inflicted millions of dollars in financial losses on Plaintiff American and needlessly disrupted the lives of hundreds of thousands of travelers. Many of these persons suffered financial losses as well, and none had anything to do with this dispute. Furthermore, they had no notice of this action so that they could make realistic alternative travel arrangements.[5]

Under the facts and applicable law, this Court must award to American the compensatory damages which are attributable to these Defendants' contemptuous actions. This

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[1] See Plaintiff's Motion for Contempt, filed February 11, 1999

[2] The APA Union has been the collective bargaining representative of American pilots since 1963. Declaration of Susan Oliver, attached as Exhibit 1 to American's Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order and Injunctive Relief (hereinafter "Oliver Declaration"), ¶ 2.

[3] Defendants APA, LaVoy, and Mayhew are collectively referred to herein as "Defendants" and/or "Contemnors."

[4] The TRO was signed and filed by the Court on February 10, 1999. The TRO is incorporated herein by reference.

[5] In modern air warfare, collateral damage to innocent civilian non-combatants always seems to be a concern, both for humane and political reasons. It was not a concern, humane or political, in this operation.

Court therefore awards American $45,507,280.00 in such compensatory damages, and Defendants APA, LaVoy, and Mayhew are held jointly and severally liable for these damages. Appropriate post-judgment interest is also awarded to American.

A. BRIEF BACKGROUND

This drama began with the acquisition of Reno Air, Inc. ("Reno"), a relatively small air carrier, by American. On or about November 19, 1998, American announced its intention to purchase the stock of Reno through a tender offer initiated by American's wholly owned subsidiary, Bonanza Acquisitions.[6] On or about December 9, 1998, American received approval from the Department of Justice for the stock acquisition.[7] Thereafter, Bonanza Acquisitions acquired approximately 84.5% of the common stock and 99% of the preferred stock of Reno.[8] Following the Reno acquisition, American advised APA of its intent to operate Reno separately for a transition period because there were legal, operational, and business constraints that prevented integration instantaneously.[9] This proposed procedure was consistent with American's acquisition of Air Cal in 1987, which entailed American operating Air Cal as a separate carrier for a transitional period during which American and APA successfully negotiated an agreement providing for the integration of the pilot workforces.[10] However, despite the

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[6] Oliver Declaration, ¶ 11.

[7] *Id.*

[8] *Id.*

[9] Oliver Declaration, ¶ 15.

[10] Oliver Declaration, ¶ 7. Defendant LaVoy testified that even the APA recognized that some sort of integration period was necessary with respect to the Reno acquisition. Defendant LaVoy testified: "I think we're down to an 18-month time frame and they are sitting at 22 months. That piece of the issue is essentially resolved." Transcript of

parties' prior course of dealing on this Air Cal acquisition, the APA did not agree with American's plan of action with respect to Reno. Rather, the APA took the position that American's operation of Reno with pilots not on American's Pilot Seniority List, albeit on a temporary basis, was in direct violation of the Recognition and Scope Clause of Section 1 (the "Scope Clause")[11] of the current collective bargaining agreement (the "CBA") in effect between American and the APA.[12] The APA took this position even though the language of the Scope Clause of Section 1 of the CBA in effect now is substantially identical to the Recognition and Scope language which bound American and APA at the time of the Air Cal acquisition.[13] Although the parties conducted discussions about the issues raised by the merger, those discussions were not successful in reaching a resolution regarding a number of important items.[14] Despite American's willingness to do so, the APA declined to adhere to their written agreement with regard to a remedy for an alleged violation of the Scope Clause and compel expedited binding arbitration under the CBA.[15] Section 1.L. of the current CBA

Proceedings—Motion for Temporary Restraining Order and Injunctive Relief, taken on February 10, 1999 (hereinafter the "February 10 Transcript"), page 43.

[11] Section 1 of the current CBA is titled "Recognition and Scope." Section 1(C) is titled "Scope" and states as follows: "(1) General. All flying performed by or on behalf of the Company or an Affiliate shall be performed by pilots on the American Airlines Pilots Seniority List in accordance with the terms and conditions of this Agreement . . ."

[12] Oliver Declaration, ¶ 16.

[13] Oliver Declaration, ¶¶ 5, 7.

[14] Oliver Declaration, ¶¶ 13, 14.

[15] Oliver Declaration, ¶¶ 10, 17, 27.

contains a procedure for expediting the arbitration of grievances arising under the Scope Clause of Section 1.[16]

Instead of engaging American in binding arbitration over the Scope Clause dispute before a neutral arbitrator with experience in airline industry disputes as they agreed to do in their contract, a large number of APA's pilot members began an unannounced sick-out of massive proportions.[17] Instigated by the APA and its current leadership, this sick-out entailed having pilots adding their names to the sick list in overwhelming numbers.[18] This illegal job action resulted in a tremendous number of flight cancellations due to lack of crew,[19] costing American millions of dollars in revenues,[20]

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[16] Oliver Declaration, ¶ 9. Section 1.L. of the CBA, titled "REMEDIES" provides, verbatim: "(1) The Company and the Association agree to arbitrate any grievance filed by the other party alleging a violation of this Section 1 on an expedited basis directly before the System Board of Adjustment sitting with a neutral arbitrator. The arbitrator shall be a member of the National Academy of Arbitrators and experienced in airline industry disputes. The burden of proof will be determined by the arbitrator. The provisions of the Railway Labor Act shall apply to the resolution of any dispute regarding this Section 1."

[17] By choosing to engage in a sick-out instead of compelling arbitration as they had agreed to do, this causes one to immediately ask the rhetorical question that if the Union was so sure of the righteousness of their cause on the issue of "Scope," why did they not arbitrate the Scope Clause dispute on an expedited basis before a neutral arbitrator experienced in airline industry disputes that they would get to help select?

[18] Plaintiff's Exhibit 43. Transcript of Proceedings—Hearing on the Issue of Compensatory Damages for Violation of Temporary Restraining Order, taken on April 15, 1999 (hereinafter the "April 15 Transcript"), pages 133- 135. Plaintiff's Exhibit 1. Transcript of Contempt Hearing, Volume I of II, taken on February 12, 1999 (hereinafter the "February 12 Transcript"), pages 14-16.

[19] Plaintiff's Exhibit 2. February 12 Transcript, pages 17-19. Plaintiff's Exhibit 45. April 15 Transcript, pages 143-144.

[20] February 12 Transcript, pages 19-20. Plaintiff's Exhibits 47 and 48. April 15 Transcript, pages 185-187.

and impacting hundreds of thousands of passengers throughout the country in the process.[21]

The sick-out began on February 6, 1999, and from February 6-9, 1999, over 1600 American flights had been canceled due to lack of crew.[22] On February 10, 1999, American came to this Court and sought a Temporary Restraining Order to end the sick-out.[23] After spending the better part of a day hearing from both American and the Defendants on the pertinent issues, [24] this Court signed the TRO at approximately 4:00 p.m. on February 10, 1999.[25] As with most such disputes, the action of signing the TRO should have brought an end to the transportation disruption, but sadly it was only the beginning.

It cannot be legitimately disputed that the sick-out actually increased in size after the signing of the TRO.[26] In fact, the largest number of American flight cancellations on a single day during the sick-out occurred on February 11, 1999 (the day after the TRO was signed), when almost 1200 flights

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[21] February 12 Transcript, page 19.

[22] Plaintiff's Exhibit 2. February 12 Transcript, pages 17-18. Plaintiff's Exhibit 45.

[23] In his opening statement, American's counsel gave notice that American would seek contempt sanctions with respect to any violation of a TRO entered in this case when he stated: "And we ask for a restraining order ... We ask for one that's strong enough that the pilots and their union will not simply ignore it without being subject to the contempt action of this Court." February 10 Transcript, page 13.

[24] See, generally, February 10 Transcript.

[25] TRO, page 4.

[26] Plaintiff's Exhibit 43. April 15 Transcript, pages 133-135. Plaintiff's Exhibit 1. February 12 Transcript, pages 14-16. See also the Supplemental Declaration of Timothy J. Ahern, attached as Exhibit 1 to Plaintiff's Motion for Contempt, filed on February 11, 1999.

were canceled that day alone. [27] That same day, American filed a Motion which sought to hold Defendants in civil contempt of court for having violated the TRO,[28] and a hearing was scheduled for February 12, 1999 on the contempt motion. [29]

After hearing evidence on the contempt motion on February 12, 1999,[30] this Court issued its Order of Contempt [31] and Findings of Fact and Conclusions of Law [32] on February 13, 1999. In the Order of Contempt, Defendants APA, LaVoy, and Mayhew were adjudged to be in civil contempt of court. [33] Because the amount of actual damages suffered by American due to Defendants' contemptuous conduct was not clear on February 13, 1999, the Court required Defendant APA to place $10,000,000.00 into the Registry of the Court, Defendant LaVoy to place $10,000.00 into the Registry of the Court, and Defendant Mayhew to

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[27] Plaintiff's Exhibit 2. February 12 Transcript, page 18. Plaintiff's Exhibit 45. The fact that the sick-out increased in size after the TRO was signed is even more disturbing in light of Defendant LaVoy's comments at the February 10, 1999 hearing. At that hearing, Defendant LaVoy stated "Well, Your Honor, we're going to do whatever you tell us to do." February 10 Transcript, page 52. The Court even recalled Defendant LaVoy's comments later that same day: ". . . I am trusting as a man of honor Captain LaVoy's representation to me that his pilots are going to do whatever I order." February 10 Transcript, page 86.

[28] Plaintiff's Motion for Contempt, filed on February 11, 1999, requested that Defendants be adjudged in civil contempt of court and requested the Court impose appropriate fines against Defendants and award Plaintiff appropriate compensatory damages as a result of Defendants' contempt.

[29] See Order to Show Cause, filed February 11, 1999.

[30] See, generally, February 12 Transcript.

[31] See Order of Contempt, filed February 13, 1999.

[32] See Findings of Fact and Conclusions of Law, filed February 13, 1999.

[33] Order of Contempt, filed February 13, 1999, page 4.

place $5,000.00 into the Registry of the Court pending resolution of the amount necessary to reimburse the aggrieved party (American) for the amount of money lost because of the Contemnors' conduct.[34] The Court reserved the right to remit monies to Defendants should the amount of damages ultimately awarded be less than the monies paid into the Registry of the Court.[35] A hearing was also set for February 17, 1999 on the issue of compensatory damages.[36]

On February 17, 1999, the parties again convened before this Court so that evidence could be taken on the amount of damages suffered by American due to Defendants' contemptuous conduct. American presented evidence at this February 17, 1999 hearing,[37] but Defendants did not present any evidence. Instead, Defendants requested a continuance so that they could have adequate opportunity to develop the pertinent facts bearing on damages.[38] This motion for continuance was granted, and the hearing on damages was continued until April 12, 1999.[39]

The hearing on damages reconvened on April 12, 1999 and was further continued on April 15, 1999, with Defendants presenting their case on damages and with American

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[34] Order of Contempt, filed February 13, 1999, pages 4-5.

[35] Order of Contempt, filed February 13, 1999, page 5.

[36] *Id.*

[37] American adduced sworn testimony from Timothy J. Ahern and Douglas G. Herring at this February 17, 1999 hearing. See, generally, Transcript of Proceedings—Hearing on the Issue of Compensatory Damages for Violation of Temporary Restraining Order, taken on February 17, 1999 (hereinafter the "February 17 Transcript").

[38] See, generally, February 17 Transcript, pages 4-12. See Defendants' Motion to Continue Hearing, filed February 16, 1999 and Defendants' Memorandum in Support of Motion to Continue Hearing, filed February 16, 1999.

[39] See Order filed February 23, 1999.

presenting rebuttal evidence on damages.[40] At the conclusion of the hearing on April 15, 1999, this Court announced its decision from the bench to award American $45,507,280.00 in compensatory damages attributable to Defendants' contemptuous conduct.[41] The Court further instructed Defendant APA to deposit an additional $10,000,000.00 into the Registry of the Court,[42] and the Court requested briefing from the parties on the issue of whether Defendants APA, LaVoy, and Mayhew should be held jointly and severally liable for the damages awarded.[43] Since April 15, 1999, the parties have come to some agreements on various (but not all) of the issues involved in this proceeding. The Court will reference at least one of those agreements in this opinion, where appropriate. With this as a backdrop, after hearing and considering all of the evidence presented by the parties at the numerous hearings detailed above, after reviewing and considering the parties' documentary evidence and briefing, after reviewing and considering relevant case law, and after taking into account the record as a whole, the Court therefore makes the following findings of fact and conclusions of law, as set forth below.[44]

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[40] See, generally, Transcript of Proceedings—Hearing on the Issue of Compensatory Damages for Violation of Temporary Restraining Order, taken on April 12, 1999 (hereinafter the "April 12 Transcript") and April 15 Transcript.

[41] April 15 Transcript, pages 269-273.

[42] April 15 Transcript, page 273. This additional $10,000,000.00 deposit was made by Defendant APA on May 4, 1999. See Defendants' Notice of Deposit into Registry of the Court, filed May 5, 1999.

[43] April 15 Transcript, page 273.

[44] Although substantially set out again in this opinion for the convenience of the parties and any reviewing court, the Court adopts and incorporates by reference the Findings of Fact and Conclusions of Law entered by this Court on February 13, 1999 as part of these Findings of Fact and Conclusions of Law. The Court further adopts and incorporates by reference the findings of fact and conclusions of law incorporated in

However, to the extent that any conflict does exist, this Memorandum Opinion (Containing Findings of Fact and Conclusions of Law) and Contempt and Damage Order controls.

B. FINDINGS OF FACT

1. Any below-listed Conclusion of Law which should more properly be listed as a Finding of Fact is hereby incorporated by reference and adopted as a Finding of Fact.

STIPULATION OF "MINOR DISPUTE"

2. The parties have stipulated and agreed[45] (and the Court has so found[46]) that the dispute leading up to the issuance of the TRO was a "minor dispute" under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq. Because it was a "minor dispute," Defendants were prohibited by the RLA from

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the TRO as part of these Findings of Fact and Conclusions of Law. The Court further adopts and incorporates by reference any findings of fact or conclusions of law that the Court has made from the bench during these proceedings as part of these Findings of Fact and Conclusions of Law. The Court further adopts and incorporates by reference the Order of Contempt entered by this Court on February 13, 1999. The Defendants' documents that were produced in discovery and admitted into evidence as Plaintiff's Exhibits 9-42 have been and are incorporated into the record. The Court does not believe that any conflict exists between this Memorandum Opinion (Containing Findings of Fact and Conclusions of Law) and Contempt and Damage Order, on the one side, and any prior Order or Findings of Fact or Conclusions of Law made by the Court in this case, on the other side.

[45] See Stipulation filed by the parties on April 28, 1999.

[46] Findings of Fact and Conclusions of Law of the Court, filed on February 13, 1999, page 1. Order of Contempt, filed on February 13, 1999, page 3. February 10 Transcript, page 51. Order Adopting Stipulation, filed May 7, 1999, page 1.

engaging in the sick-out as they did.[47] The sick-out was thus an illegal job action.

FINDINGS RELATED TO THE CONTEMPT PROCEEDINGS

3. All Findings of Fact herein are made by the Court, as the fact finder, by clear and convincing evidence where appropriate, after assessing the credibility of the witnesses called and the evidence adduced.

4. The Court finds that a TRO was signed by the Court on February 10, 1999 after both Plaintiff and Defendants had an opportunity to be heard in this Court on the issues presented therein.[48] The Defendants subject to the TRO were therefore aware of and knew of the TRO.[49] Counsel for the Defendants and Plaintiff conferred with the Court regarding the language and meaning of the TRO before its entry at 4:00 p.m. on February 10, 1999.[50] The Court found the underlying labor dispute to be a minor dispute.[51]

5. The Court finds that the APA (sometimes referred to herein as the "Union") was informed by the Court in open

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[47] See *Bhd. of R.R. Trainmen v. Chicago River & Ind. R. Co.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); *Burlington Northern R.R. Co. v. Bhd. Of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir.1992), *cert. denied*, 506 U.S. 1071, 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993).

[48] See, generally, February 10 Transcript.

[49] Defendant Mayhew affirmatively testified that the APA knew of the issuance of the TRO on the day of its issuance: "And precisely when the copy of the order came in, I can't tell you, but we were aware we were restrained. No doubt about it." February 12 Transcript, page 77.

[50] . Page 5 of the TRO contains signatures of counsel for both Plaintiff and Defendants and states that the TRO is "Approved As to Form."

[51] Findings of Fact and Conclusions of Law of the Court, filed on February 13, 1999, page 1. Order of Contempt, filed on February 13, 1999, page 3. February 10 Transcript, page 51. Order Adopting Stipulation, filed May 7, 1999, page 1.

Court on February 10, 1999 and through the issuance of the TRO that American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease.[52] Union president Richard LaVoy stated in open court that the Union would comply.[53]

6. The Court finds that the TRO contained the following provisions:

> "that the Defendants, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, or by and through their orders, are hereby temporarily restrained pending a hearing on the preliminary injunction in this matter:
>
> (a) From calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing any interference with American's airline operations, including but not limited to any strike, work stoppage, sick-out, slowdown or other concerted refusals to fly over a minor dispute or otherwise in violation of the RLA, 45 U.S.C., §§ 151-188 (1988).
>
> AND IT IS FURTHER ORDERED:
>
> (b) That the said Defendants and said other persons acting in concert with them shall take all reasonable steps within their power to prevent the aforesaid actions, and to refrain from continuing the aforesaid actions if commenced.

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[52] See, generally, the TRO, and particularly Sections (a)-(i) of the TRO. Also, this Court made the following statement in open court on February 10, 1999 at the conclusion of the TRO hearing: "But we're going to grant the temporary restraining order. Ya'll need to get those airplanes flying quickly. Okay? We'll be in recess." February 10 Transcript, page 89.

[53] February 10 Transcript, page 52.

(c) That the said Defendants shall instruct all pilots to resume their normal working schedule, and provide Plaintiff a copy of all such instructions.

(d) That APA and the individually named Defendants notify, by the most expeditious means possible, all APA-represented pilots employed by American of the issuance, contents and meaning of this Temporary Restraining Order, and produce a copy of all such messages to Plaintiff.

(e) That the notice described in (d) above include a directive from APA to those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same.

(f) That APA and the individually named Defendants post the notice described in (d) above to APA's Internet web site, and provide a copy of the notice to the Plaintiff.

(g) That APA and the individually named Defendants include the contents of the ordering paragraphs of this Order on all recorded telephone hotlines under control of Defendants or any of them, until such time as the Court has acted on Plaintiff's Motion for a Preliminary Injunction, and provide a copy of all messages to the Plaintiff."[54]

7. The Court finds that at 7:30 p.m. Central Standard Time on February 10, 1999 (3 1/2 hours after the Court's TRO), Richard LaVoy, president of the Union, sent out on the "APA Information Hotline"[55] and posted on the Internet[56] a message

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[54] The above-quoted language from the TRO is found on pages 2-4 of the TRO.

[55] Exhibit 2 to Plaintiff's Motion for Contempt, filed on February 11, 1999, is the Declaration of Roger C. Diseker (the "Diseker Declaration"). Attached to the Diseker Declaration is a transcription of a voice-mail message that was available from the Allied Pilots Association by calling 1- 800-323-1470 x. 3225. This voice mail message was recorded and

(collectively, the "February 10 communication") which was unreasonable under the circumstances and which was wholly inadequate and non-compliant with the TRO. This message was drafted, in part, by Union vice- president Brian Mayhew.[57]

8. The Court finds that the February 10 communication intentionally gave the impression and further conveyed to the Union membership that individual Union members did not have to comply with the TRO. As such, the Court finds that the February 10 communication violated Section (a) of the TRO in that it "permitted," "authorized," and "encouraged" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. This was done by specifically stating that only the Union and the individual defendant Union leaders were "Defendants," thus sending the clear message that individual Union members were not covered.[58]

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transcribed on the morning of February 11, 1999. Diseker Declaration, ¶ 2. This voice- mail message is the "APA Information Hotline" sent out by Defendant LaVoy at approximately 7:40 p.m. on February 10, 1999.

[56] Also attached to the Diseker Declaration is a copy of the APA's Internet web page APA Information Hotline. This page was printed at approximately 12:10 p.m. on February 11, 1999. Diseker Declaration, ¶ 3. This document was also admitted as Plaintiff's Exhibit 3 in the contempt proceedings. This message which was posted on the APA's Internet web page is the message posted on the Internet by the APA in the evening of February 10, 1999. This February 10, 1999 message which was posted on the APA's Internet web page is virtually identical to the voice-mail message referenced in the preceding footnote. Since they are virtually identical, this February 10, 1999 message which was posted on the APA's Internet web page and the voice-mail message referenced in the preceding footnote will be collectively referred to as the "February 10 communication."

[57] February 12 Transcript, pages 46-49; pages 82-84; pages 103-104.

[58] The February 10 communication states in pertinent part that: "Also, please be aware that where the courts order refers to 'defendants,' it is referring to APA's National Officers, Board of Directors, Negotiating Committee and General Counsel." By implying in the February 10

Furthermore, the Court further finds that by failing to instruct the approximate 2,300 pilots on the sick list on the evening of February 10[59] to clear the sick list on February 10, Defendants "permitted" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO, in violation of Section (a) of the TRO.

9. The Court finds that the February 10 communication violated Section (b) of the TRO in that it did not represent the taking of "all reasonable steps within [Defendants'] power to prevent" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. Counsel argued that the Union had until 12:00 Noon on February 12 to comply. This is not true. By simply reading the TRO, it is clear that deadline was for a report to the Court of the Union's actions to get flight operations back to normal.[60] Furthermore, the Court finds that the failure on the part of Defendants on February 10 to instruct the approximate 2,300 pilots on the

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communication that the TRO applied only to the APA, its National Officers, its Board of Directors and its General Counsel, many of the individual members of the APA clearly understood that the TRO did not apply to them. For example, on the evening of February 10, 1999, one pilot stated in an e- mail: "I gather from the APA info hotline that the Judges injunction doesn't apply to the masses anyway. . . . hahahaha. . . ." See Plaintiff's Exhibit 15. Another stated that same night: "You're not listening . . . the TRO says the UNION and its OFFICERS are restrained from encouraging a sick out, slowdown, work stoppage etc etc . . . He HAS to tell us . . . DON'T DO IT!!" See Plaintiff's Exhibit 16. Yet another stated that same night: "As earlier posted, the judge ordered the union LEADERSHIP to not encourage illegal activity ... Call all media, tell them the only thing the union told us is that the union leadership may not condone illegal activity. The judge's order did not affect the pilots." See Plaintiff's Exhibit 21.

[59] See Plaintiff's Exhibit 1.

[60] Page 4 of the TRO states: "That APA and the individually named Defendants report by 12:00 noon on February 12, 1999, by sworn affidavit, the methods used to effect the notice described in (d) above to all APA- represented pilots."

sick list on February 10[61] to clear the sick list after the issuance of the TRO is also an act of contempt[62] and a violation of Section (b) of the TRO. It would have been clearly reasonable (and obviously required under the TRO) to instruct the pilots on the sick list to clear the sick list so that American's operations could be restored to normal.

10. The Court finds that the February 10 communication violated Section (c) of the TRO in that it did not "instruct all pilots to resume their normal working schedule ..." This required language is simply not found anywhere in the February 10 communication.

11. The Court finds that the February 10 communication violated Section (d) of the TRO in that it did not "notify, by the most expeditious means possible, all APA-represented pilots employed by American of the . . . contents and meaning" of the TRO. Again, it was made clear to the Union that the issuance of the TRO meant that American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease.[63] The Court finds that the February 10 communication did not convey this meaning. To get the planes flying again immediately after the issuance of the TRO, it was necessary for Defendants to instruct the approximate 2,300 pilots on the sick list on February 10[64] to clear the sick list. That did not happen on February 10, which is also an act of contempt.[65]

12. The Court finds that the February 10 communication violated Section (e) of the TRO in that it did not "include a directive from APA to those pilots who are engaging in a

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[61] See Plaintiff's Exhibit 1.

[62] April 12 Transcript, page 74; pages 79-80.

[63] See the TRO and particularly Sections (a)--(i) of the TRO. February 10 Transcript, page 89.

[64] Plaintiff's Exhibit 1.

[65] April 12 Transcript, page 74; pages 79-80.

sick-out or other concerted refusals to fly to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same." Again, this required language is simply not found anywhere in the February 10 communication. Section (e) of the TRO was also violated on February 10 by Defendants' failure to instruct the approximate 2,300 pilots on the sick list to clear the sick list. In order to cease and desist the illegal sick-out, it was necessary for the pilots on the sick list on February 10 to clear it. The pilots did not do so because they were not directed to do so by Defendants, which was a violation of Section (e) of the TRO.

13. The Court finds that the February 10 communication violated Section (f) of the TRO, as it is the Court's understanding that the message sent out on the "APA Information Hotline" on February 10 by Defendant LaVoy was also posted virtually verbatim on the APA's Internet web site. By posting the contemptuous and inadequate February 10 communication on the APA's Internet web page, Section (f) of the TRO was violated.

14. The Court finds that the February 10 communication violated Section (g) of the TRO, as all of the ordering paragraphs of the TRO were not contained in the February 10 communication. In fact, only one of the ordering paragraphs (Section (a)) was listed.

15. For the reasons set forth above, the Court finds that the steps taken by the Union (and Defendants LaVoy and Mayhew on behalf of the Union) to comply with the TRO on February 10, 1999 were foreseeably ineffective and would only give the impression and further convey to the Union membership that individual Union members did not have to comply with the TRO. As what should have been a surprise to

no one, the sick-out actually increased.[66] The Court finds not only that this result was foreseeable, it was intended.

16. The Court finds that the unlawful sick-out of APA pilots subsequent to the issuance of the TRO continued and actually increased in numbers, all in direct violation of the TRO.[67]

17. The Court finds that the aforementioned violations of the TRO amount to a ratification of the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." United States Steel Corp. v. United Mine Workers of America, Dist. 20, 598 F.2d 363, 365 (5th Cir.1979). The Court so finds ratification by the Union of the continued unlawful sick-out and charges the Union with responsibility for allowing the continued unlawful sick-out to continue in direct violation of this Court's TRO.

18. The Court believes language from *United States Steel Corp. v. United Mine Workers of America, Dist. 20*, 598 F.2d 363 (5th Cir.1979) is appropriately quoted here because of the language's applicability to this matter:

> The "return-to-work directives [are] 'so lacking in authoritative forcefulness that they either were not heard at all ... or were discounted as being merely stage lines parroted for the benefit of some later judicial review.'" *United States Steel Corp.*, 598 F.2d at 366.

The Court finds that the February 10 communication was "so lacking in authoritative forcefulness that [it] either [was] not

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[66] Plaintiff's Exhibit 43. April 15 Transcript, pages 133-135. Plaintiff's Exhibit 1. February 12 Transcript, pages 14-16. See also the Supplemental Declaration of Timothy J. Ahern, attached as Exhibit 1 to Plaintiff's Motion for Contempt, filed on February 11, 1999.

[67] *Id.*

heard at all ... or [was] discounted as being merely stage lines parroted for the benefit of some later judicial review." *Id.*

19. The evidence demonstrates and the Court finds that the Union ran a phone bank[68] between February 7 and February 10 to call pilots and encourage them to call in sick when in fact they were not sick for the express purpose of economically damaging American Airlines "to get [American] off the dime." (Testimony of Defendant Larry Foster).[69] This amazingly candid, and damaging, testimony confirmed what common sense already compelled: that this illegal sick-out was instigated by the Union[70] and was not "spontaneous" as had been represented to the Court.[71] This illegal activity, as admitted by this Union leader, was Union orchestrated, instigated, and driven, and continued to be so as of the time of

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[68] Defendant Larry Foster referred to this as a "phone tree" and stated that "a phone tree is when you're making calls." February 12 Transcript, page 139. Conversely, "a 'phone watch' is when your people are calling in and you're answering them." February 12 Transcript, page 139.

[69] February 12 Transcript, pages 140-144.

[70] *Id.* Captain Norman Patterson, another Defendant in this cause, also confirmed the existence of an organized sick-out prior to the issuance of the TRO and confirmed that he, too, was personally involved in the organization of the sick-out. February 12 Transcript, pages 173-174.

[71] In the February 10, 1999 TRO hearing, one of Defendants' counsel made several references to his understanding of the alleged fact that the APA had not authorized the exercise of self-help through a sick-out (February 10 Transcript, pages 31-32) and that the sick-out was a "spontaneous eruption." February 10 Transcript, page 67. Defendant LaVoy also referred to the situation as being "spontaneous." February 10 Transcript, page 45. Of course, as is now clear from the record, including the sworn testimony of Defendants Foster and Patterson, these representations were not true. At the April 12, 1999 hearing, another of Defendants' counsel candidly admitted that there seemed to be an orchestrated, organized effort to have pilots call in sick (April 12 Transcript, page 31), a complete 180 degree turn from what had earlier been stated to the Court on the record in open court by LaVoy and Defendants' counsel. This apparent lack of honesty is troubling

the contempt hearing on February 12, 1999. It is the Union who is responsible for the consequent damages. Logic would thus dictate that the Union could have stopped it if they chose to. At the time of the contempt hearing on February 12, 1999, they sadly had not.

20. The evidence further demonstrates that although a phone bank (in the form of a "phone tree") was operational to cause the sick-out,[72] at the time of the contempt hearing on February 12, 1999, one had not been established to call pilots to get them to stop. This is so even though from the operation of the "phone watch," they had both the lines and manpower to take this very reasonable action to end this illegal sick-out and comply with this Court's Order.[73] The Court finds it unreasonable for Contemnors to not take the same measures to end the work stoppage as they had employed to start it. The Court finds this to be a violation of Section (b) of the TRO, which requires the taking of "all reasonable steps within [Defendants'] power to prevent" the continued unlawful sick-out.

21. The majority (12) of the individual defendant union leaders were on sick status at the time of the contempt hearing on February 12, 1999.[74] They were not present for the hearing.[75] The Court finds that this sent a loud and clear message to the rank and file members of the Union as to how seriously the membership should take the Court's TRO and how seriously they should take the Union's judicially ordered statements to return to work.

22. As to the individual defendants, the Court finds and believes from the evidence that Union president Richard LaVoy and vice-president Brian Mayhew could have

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[72] February 12 Transcript, pages 140-144.

[73] *Id.*

[74] February 12 Transcript, pages 68-70.

[75] February 12 Transcript, page 7.

immediately ended this sick-out and gotten American Airlines operational again if they had chosen to. The Court further finds that they were the individual defendants responsible for the February 10 communication,[76] the Union's subsequent actions and inactions,[77] and thus the APA's disobedience of the TRO.[78]

23. The Court finds that the flouting of this Court's TRO by the Union on February 10, 1999 by virtue of the February 10 communication led to the continued unlawful sick-out in increased numbers in direct violation of this Court's TRO.[79]

24. Defendants have argued that they purged their contempt as of February 11, 1999 at approximately 1:00 p.m.[80] It was then at that approximate time that the "APA

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[76] February 12 Transcript, pages 46-49; pages 82-84; pages 103-104.

[77] Defendants' Exhibit 3, the Declaration of Richard T. LaVoy, filed on February 12, 1999, contains an acknowledgment by Defendant LaVoy of his important role in making policy in the APA when Defendant LaVoy states: "I am the principal executive officer of APA responsible for administering the affairs of the Association."

[78] Defendant Mayhew testified that the APA's legal department did not "like" the February 10 communication and that "they wanted it changed." February 12 Transcript, page 110. Defendant Mayhew further testified that "legal was upset about the [February 10 communication], they wanted it changed immediately and they were drafting it at that time." *Id.* While this testimony certainly could be construed to mean that the APA legal department recognized that the February 10 communication was inadequate under the terms of the TRO, Defendant Mayhew did not testify with any more particularity about what it was that caused legal to be upset with regard to the February 10 communication. However, Defendant LaVoy testified that the APA's legal counsel "had no problem with the contents of the [February 10 communication]" but that "it wasn't sufficient to fulfill the judge's order." February 12 Transcript, page 189

[79] Plaintiff's Exhibit 43. April 15 Transcript, pages 133-135. Plaintiff's Exhibit 1. February 12 Transcript, pages 14-16. See also the Supplemental Declaration of Timothy J. Ahern, attached as Exhibit 1 to Plaintiff's Motion for Contempt, filed on February 11, 1999.

[80] April 12 Transcript, pages 9-10; page 42.

Information Hotline for Thursday, February 11" went out (the "February 11 oral communication").[81] In addition, between 1:00 p.m. and 2:00 p.m. on February 11, 1999, Defendants also provided Exhibit A to Defendants' Exhibit 3 to the three APA National Officers, to the eighteen APA Board of Directors members, to the four APA Negotiating Committee members, and to numerous APA Committee Members by e-mail, fax, or hand-delivery.[82] Defendant LaVoy also convened a conference call that same day to discuss compliance with the TRO.[83] The APA also posted Exhibit A to Defendants' Exhibit 3 on the APA and domicile websites on February 11, 1999.[84] That same day, members of the APA Board of Directors were instructed to post Exhibit A to Defendants' Exhibit 3 on every domicile bulletin board as soon as possible.[85] That same day, Defendant LaVoy instructed the APA print shop to prepare and mail a copy of Exhibit A to Defendants' Exhibit 3 to all members of the APA.[86] That same day, the APA sent a copy of the Court's TRO by e- mail to approximately 6,350 pilots who are listed with the APA. [87] Finally, on that same day of February 11, 1999, the APA posted a copy of the Court's TRO on its website.[88] (All of these efforts of February 11, 1999 will be collectively referred to as the "February 11 efforts"). However, as stated below, the Court finds that these February

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[81] The February 11 oral communication is attached as Exhibit B to Defendants' Exhibit 3 in the contempt proceedings. February 12 Transcript, page 209.

[82] February 12 Transcript, pages 194-201. Defendants' Exhibit 3, page 1.

[83] Defendants' Exhibit 3, page 1.

[84] Defendants' Exhibit 3, page 2.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

11 efforts came too little too late and were still foreseeably inadequate to have the Union come into compliance with the TRO and end the sick-out.

25. The Court finds there is nothing said in the February 11 efforts that were not known to the Union, its leadership, and counsel that could not have been said in the February 10 communication. Nevertheless, even with the February 11 efforts, the Court rejects Contemnors' arguments to the contrary and finds that the Contemnors did not comply with the Court's TRO through their February 11 efforts.[89]

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[89] To be clear, the Findings of Fact and Conclusions of Law of this Court, which were filed on February 13, 1999, do NOT find that the contempt had ended with the February 11 efforts of the Union. If the Findings of Fact and Conclusions of Law are read as a whole, it is clear that the Court was not finding that the contempt had ended with the February 11 efforts of the Union. For example, in finding of fact number 18, it states that the efforts "came too little, too late." It is clear that the Court is finding the efforts of February 11 to still be too little (which means not enough). That same finding refers to "the continued unlawful sick-out in increased numbers." These words, which were filed and signed on February 13, speak in the present tense—a CONTINUED unlawful sick-out. These words would not have been in the present tense on February 13 had the February 11 efforts purged the contempt. As another example, in finding of fact number 20, the illegal activity of the sick-out is found to be Union orchestrated, instigated, and driven, and "continues to be so." Again, those words—CONTINUES TO BE SO—which were filed and signed on February 13, speak in the present tense. Again, these words would not have been in the present tense on February 13 had the February 11 efforts purged the contempt. That same finding states that "[l]ogic would thus dictate the Union could stop it if they chose to. At this point [FEBRUARY 13], they sadly have not." See Findings of Fact and Conclusions of Law, filed February 13, 1999. See also April 12 Transcript, pages 75-78. More examples of why the February 13, 1999 Findings of Fact and Conclusions of Law did not find that the contempt had ended on February 11 can be found at pages 74-78 of the April 12 Transcript. At the time of the delivery of the Court's ruling on the morning of the 13th, the Court was unaware of the activities of the APA in the evening of the 12th, which, as discussed later, were reasonable and

26. The Court finds that the February 11 efforts failed to comply with the TRO for at least the following reasons:[90]

a. The APA had forewarned its membership that American would probably seek court intervention and an injunction against the illegal sick out.[91]

b. The APA advised its membership through e-mail and other communications that if an injunction was granted against the sick out, then the APA's communications to its membership would be censored or sanitized. For example, on the morning of February 10, 1999 (the day that the TRO was issued), APA Board Members D.D. DellaGreca and Mark Hunnibell (both named Defendants in this lawsuit) sent an e-mail that stated:

> "In closing we would like to say that this could possibly be one of the last uncensored messages you receive from us. If the company obtains an injunction, your Representative's communications may be restricted. We feel that this would produce the reverse effect and further galvanize the pilot group. Remember, an injunction would apply to APA and its officers, NOT the individual pilot. You could expect hotline barrages and possibly calls from Chief Pilots or even Check Airmen asking you to fly your trips. The decision of your fitness to fly is yours, not theirs, and certainly not a judge's."[92] Jeff Marchand (also a named Defendant in this lawsuit) sent a similar message on the morning of February 10, 1999 when he stated: "It appears that

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adequate and ended not only the period of contempt, but ended the illegal sick-out.

[90] Points a., b., and c. from paragraph 26 also further support the Court's findings of contempt with regard to the February 10 communication.

[91] See, e.g., Plaintiff's Exhibit 9 and Plaintiff's Exhibit 13.

[92] Plaintiff's Exhibit 9.

American Airlines is preparing to seek an injunction against the APA. If they are successful the injunction will be against the institution and not individual pilots. Do not allow anybody to pressure you to fly if you are sick. If an injunction is ordered I may be forced to stop these updates."[93] The Court finds that these messages (and others like them) forewarned the members of the APA that they should ignore any court order ordering them to end their illegal sick-out and that they should ignore any return to work messages from the Union. In light of the fact that the APA sent out messages forewarning the members of the APA that they should ignore any court order ordering them to end their illegal sick-out and that they should ignore any return to work messages from the Union, the Court finds that the February 11 efforts violated Section (a) of the TRO in that they "permitted," "authorized," and "encouraged" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. The Court finds that the APA could and should have instructed their members on February 11 that the prior messages to disregard any court order should themselves be disregarded. Of course, the February 11 efforts failed to do this and therefore "permitted," "authorized," and "encouraged" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO, in violation of Section (a) of the TRO. Furthermore, the Court further finds that by failing to instruct the approximate 2,400 pilots on the sick list on February 11[94] to clear the sick list on February 11, Defendants "permitted" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO, in violation of Section (a) of the TRO.

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[93] Plaintiff's Exhibit 13.

[94] Plaintiff's Exhibit 1.

c. The Court finds that the February 11 efforts violated Section (b) of the TRO. The February 11 efforts did not represent the taking of all "reasonable steps within [Defendants'] power to prevent" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO because, in light of the fact that the APA sent out messages forewarning the members of the APA that they should ignore any court order ordering them to end their illegal sick-out and that they should ignore any return to work messages from the Union, the Court finds that the APA could and should have instructed their members on February 11 that the prior messages to disregard any court order should hemselves be disregarded. Of course, the February 11 efforts failed to do this and therefore did not represent the taking of all "reasonable steps within [Defendants'] power to prevent" the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO, in violation of Section (b) of the TRO. Furthermore, the Court finds that the failure on the part of Defendants on February 11 to instruct the approximate 2,400 pilots on the sick list on February 11[95] to clear the sick list after the issuance of the TRO is also an act of contempt [96] and a violation of Section (b) of the TRO. It would have been clearly reasonable (and obviously required under the TRO) to instruct the pilots on the sick list to clear the sick list so that American's operations could be restored to normal.

d. The Court finds that the February 11 efforts violated Section (d) of the TRO in that they did not "notify, by the most expeditious means possible, all APA-represented pilots employed by American of the ... contents and meaning" of the TRO. Again, it was made clear to the Union that the issuance of the TRO meant that American Airlines planes needed to start flying again immediately and that the unlawful

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[95] *Id.*

[96] April 12 Transcript, page 74; pages 79-80.

sick-out of Union pilots must immediately cease.[97] The Court finds that the February 11 efforts did not convey this meaning. In addition, to get the planes flying again as late as February 11, it was necessary for Defendants to instruct the approximate 2,400 pilots on the sick list on February 11[98] to clear the sick list. That did not happen on February 11, which is also an act of contempt.[99]

e. The Court finds that the February 11 efforts violated Section (e) of the TRO in that they did not "include a directive from APA to those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same." Nowhere do the February 11 efforts state that the APA is directing those pilots who are engaging in a sick-out or other concerted refusals to fly to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same. In fact, because of this failure on the part of the APA on February 11, messages in violation of Section (e) of the TRO continued to be sent.[100] Section (e) of the TRO was also

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[97] See the TRO and particularly Sections (a)-(i) of the TRO. February 10 Transcript, page 89.

[98] Plaintiff's Exhibit 1.

[99] April 12 Transcript, page 74; pages 79-80.

[100] See, e.g., Plaintiff's Exhibit 25, wherein Denis Breslin (a named Defendant in this lawsuit) instructed the pilots based in his Domicile on February 11, 1999 at 3:54 p.m. (almost a full 24 hours after the TRO was entered) that "[a]lthough we are ordered to comply with the following TRO, it should not be construed as an order for sick pilots to return to work. If you are well, you should report for work. If you are sick you should put yourself on the sick list." This message must be viewed against the backdrop of how the Union was defining "sick" during the sick-out instigation stage, e.g. "feeling stress over contract disputes," etc. See Plaintiff's Exhibit 17: "The message we have been putting out for the past several days is—if you are sick you need to call in sick and stay on

violated on February 11 by Defendants' failure to instruct the approximate 2,400 pilots on the sick list on February 11[101] to clear the sick list. In order to cease and desist the illegal sick-out, it was necessary for the pilots on the sick list on February 11 to clear it. The pilots did not do so because they were not directed to do so by Defendants, which was a violation of Section (e) of the TRO.

f. The Court finds that the February 11 efforts violated Section (f) of the TRO. Again, it was made clear to the Union that the issuance of the TRO meant that American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease.[102] The Court finds that the February 11 efforts (as posted on the APA's Internet web site) did not convey this meaning on the APA's Internet web site and therefore violated Section (f) of the TRO.

g. The Court finds that although the APA sponsored a passive "phone watch" commencing on February 11, 1999 at approximately 2:00 p.m.,[103] it did not effectively comply with the Temporary Restraining Order by affirmatively ordering the membership to halt the work stoppage by clearing the sick list. Instead, the script provided to the phone watch personnel only instructed pilots who happened to call in to resume their normal working schedule and "to otherwise comply" with the TRO.[104] While it is true that paragraph (c) of the TRO

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the sick list until you are 100% fit to fly. In addition, if you [sic] under stress, you are sick."

[101] Plaintiff's Exhibit 1.

[102] See the TRO and particularly Sections (a) -(i) of the TRO. February 10 Transcript, page 89.

[103] Declaration of Richard T. LaVoy, filed February 16, 1999, page 2 and Exhibit A thereto. Defendants' Exhibit 1.

[104] Exhibit A to Declaration of Richard T. LaVoy, filed February 16, 1999. See the TRO and particularly Sections (a)-(i) of the TRO. February 10 Transcript, page 89.Defendants' Exhibit 1.

required an instruction for the pilots to resume their normal working schedule, the Union was informed by the Court in open Court on February 10, 1999 and through the issuance of the TRO that American Airlines planes needed to start flying again immediately and that the unlawful sick-out of Union pilots must immediately cease.[105] The Court finds that the script provided to the phone watch did not go far enough in making that point abundantly clear. The Court finds that to comply with Sections (b) and (d) of the TRO, this phone bank should have actively called pilots (in the form of a "phone tree") to instruct them to return to work. It was not enough to be in compliance for the phone bank personnel to merely sit there and wait for the phone to ring (in the form of a "phone watch").[106]

h. The Court finds that the February 11 oral communication[107] was very similar to the contemptuous February 10 communication. For example, the February 11 oral communication still contains the pejorative description of the Court's TRO as "legal maneuvering," as did the February 10 communication. Also, the February 11 oral communication also contains language stating that the TRO "does not constitute a judgment on the merits of the contractual dispute," as did the February 10 communication. The Court finds that these references to "legal maneuvering" and to the TRO not constituting "a judgment on the merits of the

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[105] See the TRO and particularly Sectiona (a)-(i) of the TRO. february 10 Transcript page, 89.

[106] Defendant Mayhew testified on February 12 that he helped prepare this February 11 phone watch script, which this Court has found to be inadequate and in violation of the TRO: "We have done that and we have done a phone watch. I help [sic] prepare yesterday and reviewed a script that we're having our people on the phone watch read. These are phone banks that pilots call in to talk to other pilots. And it says flat out we are instructing you to resume your normal schedule." February 12 Transcript, page 99.

[107] Exhibit B to Defendants' Exhibit 3.

contractual dispute" on February 11, 1999 (and on February 10) had the tendency to send a further signal to the APA's membership that they should stay off duty and not comply with the TRO. A significant difference between the February 11 oral communication and the February 10 communication is that the Contemnors deleted wording from the February 11 oral communication that implied that the pilots should stay on the sick list because the Court's Order applied only to the APA, its National Officers, its Board of Directors and its General Counsel.[108] Merely deleting that portion would not somehow now indicate to the members that the TRO now applied to them rather than the Union, its officers, its directors, and its General Counsel. The omission on the 11th did not undo the affirmative message of the 10th. It was not sufficient to comply with the TRO, especially in light of Contemnors' prior directives to the pilots to stay the course, notwithstanding any Court order. The damage had already been done and the February 11 efforts were inadequate to undo that damage, which Contemnors knew. Taking the successive messages as a whole, "sick" pilots would not know on the 11th that the TRO now really did apply to them and that they were to now clear the sick list. Again, as a surprise to no one, they didn't.[109]

i. The Court finds that the even after the February 11 oral communication was issued and the February 11 efforts were undertaken, the sick list of pilots still increased.[110] This fact further demonstrates that the February 11 efforts were not sufficient to comply with the TRO and end the illegal sick-out which the APA started.

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[108] February 12 Transcript, page 213.

[109] Plaintiff's Exhibits 1 and 43.

[110] April 15 Transcript, pages 136-137. Plaintiff's Exhibit 43.

j. The Court finds that, as an example of the "wink-and-a-nod" approach that was taken toward complying with this Court's TRO, Defendant Denis Breslin, a member of the APA Board of Directors, even went so far as to instruct the pilots based in his Domicile on February 11, 1999 at 3:54 p.m. (almost a full 24 hours after the TRO was entered) that "[a]lthough we are ordered to comply with the following TRO, it should not be construed as an order for sick pilots to return to work. If you are well, you should report for work. If you are sick you should put yourself on the sick list."[111] Again, this and other messages from Union leadership must be viewed in light of the pre-TRO battle plan that had been discussed as to how to respond to a TRO,[112] the Union's disingenuous definition of "sick" it gave to its members,[113] and the over all use of the code language implemented in communications. Advantage was attempted to be taken of the process of self reporting and self clearing by pilots who are really sick coupled with the universal agreement for the primacy of air safety. In short, the APA leadership believed that because of these facts (that is, that no Judge could determine fitness to fly) any TRO would be unenforceable and that they were thus bullet proof.

A factfinder is allowed to look at the record as a whole, make logical inferences, and generally not be required to check his or her common sense at the courtroom door.

27. For the reasons set forth above, the Court finds that the steps taken by the Union to comply with the TRO on February 11, 1999 were foreseeably ineffective and would only give the impression and further convey to the Union membership that individual Union members did not have to comply with the TRO. As what should have been a surprise to

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[111] Plaintiff's Exhibit 25.

[112] See, e.g., Plaintiff's Exhibit 17.

[113] *Id.*

no one again, the number of crew cancellations due to post TRO noncompliance actually increased.[114] The Court finds not only that this result was foreseeable, it was intended.

28. The Court finds that the aforementioned violations of the TRO by virtue of the February 11 efforts amount to a ratification of the continued unlawful sick-out of APA pilots subsequent to the issuance of the TRO. "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." *United States Steel Corp.*, 598 F.2d at 365. The Court so finds ratification by the Union of the continued unlawful sick-out and charges the Union with responsibility for allowing the continued unlawful sick-out to continue in direct violation of this Court's TRO.29. The Court believes language from *United States Steel Corp. v. United Mine Workers of America, Dist. 20*, 598 F.2d 363 (5th Cir.1979) is again appropriately quoted here because of the language's applicability to this matter:

> The "return-to-work directives [are] 'so lacking in authoritative forcefulness that they either were not heard at all . . . or were discounted as being merely stage lines parroted for the benefit of some later judicial review.'" *United States Steel Corp.*, 598 F.2d at 366.

The Court finds that the February 11 efforts were "so lacking in authoritative forcefulness that [they] either [were] not heard at all ... or [were] discounted as being merely stage lines parroted for the benefit of some later judicial review." *Id.*

30. The court finds that the Contemnors knew the February 10 communication and the February 11 efforts were ineffective to end the work stoppage but did nothing to correct them. Not only was this gamesmanship outrageous, it was patently unwise to think that this transparent charade,

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[114] Plaintiff's Exhibit 45.

much like the "spontaneous" sick-out, would not be seen for what it was. Although the truth of the "spontaneous" sick-out was finally admitted, there are now over 45 million reasons not to admit the truth concerning the efforts made, or lack thereof, to obey the Court and end the illegal job action as ordered.

31. The Court has already found Defendants APA, LaVoy, and Mayhew in civil contempt of court[115] and has already granted Plaintiff's motion for contempt. Plaintiff's Motion for Contempt was filed on February 11, 1999.

32. The Court finds that Contemnors were, at all times, capable of ***effectively*** communicating with the APA membership to end the work stoppage as evidenced by the fact that they did. At approximately 8:00 p.m.,[116] Central Time, on February 12, 1999, Richard LaVoy, president of the Union, after attending the Show Cause hearing on February 12, 1999 where it was readily apparent that the Court would hold at least some of the Defendants in contempt,[117] recorded a new information hotline message[118] for the APA membership which stated the following:

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[115] See Order of Contempt, filed February 13, 1999, page 4.

[116] The Court notes that there seems to be a discrepancy in the record over whether this message was sent at 8:00 p.m. or 9:00 p.m., Central Time, on February 12. Exhibit "E" to the February 16, 1999 Declaration of Richard T. LaVoy indicates that the message was sent at 9:00 p.m. However, Exhibit "F" to the February 16, 1999 Declaration of Richard T. LaVoy indicates that the message was sent at 8:00 p.m. The Court will resolve this conflict to give Contemnors' the benefit of the doubt and finds that this message was sent at 8:00 p.m., Central Time, on February 12, 1999.

[117] People tend to see the light when they feel the heat.

[118] Defendant Mayhew testified that hotline messages are typically recorded by Defendant LaVoy after both Mayhew and LaVoy review, revise, and approve of the hotline message: "The process that we use normally is that the Director of Communications, Gregg Overman, does a

"I want to make a ***personal plea*** to all of our pilots: the Association's leadership needs your help in complying with Judge Joe Kendall's Order. We need to get this airline back up and running at full capacity, and we need to do so quickly. Please ***clear the sick list immediately*** and resume your normal schedule. Again, APA is absolutely serious about doing all we can to comply with the judge's order, and APA's entire leadership is asking for your help in doing so." (emphasis added) (the "February 12 Hotline Message").[119]

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first draft. Frequently a member--or members--of the communications committee are also working with him on the draft. They bring back a rough draft. Typically President LaVoy and myself look at it at that point, and if he was not there at that time—and I believe he was, but if he was not, then I would have looked at it also and would have been asked to make input. Then the—they take my input and the Director of Communications and whoever else is working with him come up with the final draft. That goes back to the president [LaVoy], who makes any changes he has. Then he puts it on the tape." February 12 Transcript, pages 82-83. Defendant Mayhew also affirmatively testified that Defendant LaVoy must approve of any hotline message before it goes out to the membership of the APA: "The president [LaVoy] would approve that. Always he has the last cut." February 12 Transcript, page 92. Defendant LaVoy offered substantially similar testimony to Defendant Mayhew on this typical procedure. February 12 Transcript, pages 46-48. This testimony from Defendants Mayhew and LaVoy further supports the findings of civil contempt made by this Court against Defendants LaVoy and Mayhew. As the individuals (president and vice- president) ultimately responsible for the hotline messages to the APA membership, the Court finds that these individuals could have immediately ended the sick-out by instructing compliance with the terms of the TRO. However, as demonstrated herein, they did not do so until the evening of February 12, 1999 even though they could have done so on the evening of February 10, 1999.

[119] Declaration of Richard T. LaVoy, filed on February 16, 1999, page 3 and Exhibits "E" and "F" thereto

The February 12 Hotline Message was also posted on the APA's Internet web site[120] and was sent by e-mail to approximately 6,410 members of the APA.[121] (The Court will collectively refer to all of these transmissions of the February 12 Hotline Message as the "First February 12 instruction to clear the sick list").

33. The Court finds that at approximately 8:45 p.m. on February 12, 1999, the APA National Officers and the APA Board of Directors posted the following message on the APA Internet web site:

> "The APA National Officers and Board of Directors are making our best effort to comply with the Temporary Restraining Order issued by Judge Kendall on Wednesday afternoon. All of us in the APA leadership are making a ***personal plea*** to our fellow pilots ***to clear the sick list immediately*** and to resume your normal schedule. ***APA's leadership firmly believes it is in the best interest of the Allied Pilots to do our part to fully restore the American Airlines system. We need your help to do this and we need it now."*** (emphasis added) (the "Second February 12 instruction to clear the sick list").[122]

The Court further finds that at approximately 8:53 p.m. on February 12, approximately 6,410 members of the APA were simultaneously sent the Second February 12 instruction to clear the sick list by e-mail.[123] The Court further finds that on

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[120] Declaration of Richard T. LaVoy, filed on February 16, 1999, page 3 and Exhibit "E" thereto.

[121] Declaration of Richard T. LaVoy, filed on February 16, 1999, page 4 and Exhibit "F" thereto.

[122] Declaration of Richard T. LaVoy, filed on February 16, 1999, page 3 and Exhibit "D" thereto.

[123] Declaration of Richard T. LaVoy, filed on February 16, 1999, page 3 and Exhibits "B" and "C" thereto.

the evening of February 12, Defendant LaVoy instructed that a recorded message be added to the APA phone watch line which would be heard after hours and during times that no line was open.[124] The message included the following statement: "APA's entire leadership requests our pilots ***clear the sick list immediately and return to their normal work schedule.***" (emphasis added) (the "Third February 12 instruction to clear the sick list").[125] The Court further finds that on the evening of February 12, 1999 (and into February 13), Defendant Foster and other volunteers undertook to affirmatively call fellow DFW pilots with the following message: "Fellow DFW Pilots. A message from Captain Larry Foster and Captain Norm Patterson. We are requesting that ALL pilots ***return to their normal work schedule immediately*** and ***clear the sick list as soon as possible.*** Please refer to the TRO that was issued February 10, 1999. Your professionalism is greatly appreciated." (emphasis added in bold) (the "Fourth February 12 instruction to clear the sick list").[126] The Court further finds that on the evening of February 12, Defendant LaVoy convened a conference call with the members of the APA Board of Directors and the APA Negotiating Committee in which he urged Board members to contact pilots in their domiciles and ask that they ***immediately clear the sick list*** and resume normal operations and to ask them to in turn ***contact their fellow pilots to***

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[124] Declaration of Richard T. LaVoy, filed on February 16, 1999, page 4.

[125] Declaration of Richard T. LaVoy, filed on February 16, 1999, page 4 and Exhibit "G" thereto.

[126] Declaration of Richard T. LaVoy, filed on February 16, 1999, page 6 and Exhibit L thereto. The Court notes that this "phone tree" on the evening of February 12, which finally put in place the same efforts to have pilots end the illegal sick-out as were put in place to begin it (that is outgoing calls to the pilots), contained a personal plea from Defendants Foster and Patterson, both of whom admitted their involvement in organizing the illegal sick-out.

request that they do the same. (emphasis added) (the "Fifth February 12 instruction to clear the sick list").[127]

34. The Court finds that after the First February 12 instruction to clear the sick list, the Second February 12 instruction to clear the sick list, the Third February 12 instruction to clear the sick list, the Fourth February 12 instruction to clear the sick list, and the Fifth February 12 instruction to clear the sick list[128] were made, the pilot sick list began to clear at a dramatic rate.[129] No longer was there any talk about to whom the TRO applied and to whom it did not apply. Gone were any coded instructions about sick pilots not returning to work. This is because it was silly for anyone to believe that this Court, or that anyone in their right mind, would suggest, much less order, a pilot who is really sick to clear the sick list and go fly a jet across the country with hundreds of lives at stake.

35. Within 24 hours of the February 12 Hotline Message being issued, almost a thousand pilots came off the sick list.[130] The Court finds that this miraculous "mass healing" was directly caused by the Return to Work Directives.

36. The Court finds that prior to the Return to Work Directives, there had been no net decrease in the number of pilots on the sick list.[131] In fact, the number of pilots on the sick list actually increased from the time the Court entered its

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[127] Declaration of Richard T. LaVoy, filed on February 16, 1999, page 2.

[128] The First February 12 instruction to clear the sick list, the Second February 12 instruction to clear the sick list, the Third February 12 instruction to clear the sick list, the Fourth February 12 instruction to clear the sick list, and the Fifth February 12 instruction to clear the sick list are collectively referred to herein as the "Return to Work Directives."

[129] Plaintiff's Exhibit 43.

[130] Plaintiff's Exhibit 43. April 15 Transcript, pages 137-138.

[131] Plaintiff's Exhibit 43.

TRO on February 10, 1999 until the Return to Work Directives were made on the night of February 12, after the contempt hearing.[132]

37. The Court finds that the Return to Work Directives were the first good faith efforts by the Contemnors to comply with the terms of the TRO.

38. The Court finds that prior to the Return to Work Directives, the Contemnors had failed and refused to comply with the terms of the Court's TRO. As stated above, until the APA membership received the Return to Work Directives issued on February 12, 1999, the number of pilots on sick status had actually increased from the time this Court entered its TRO at 4:00 p.m. on February 10, 1999.[133] Based on the facts cited above, as well as the other evidence submitted and the Court's assessment of the credibility of the witnesses, the Court, as factfinder, can and does reject the Contemnors' arguments that the delay in restoring the airline was caused by collective bargaining agreement scheduling requirements or American's alleged intentional cancellation of flights where crews were available. The Court finds those arguments to simply not be supported by the credible evidence.

39. The Court finds that no prior communication from the Contemnors to the pilots contained a "personal plea" or an instruction to "clear the sick list immediately" as the Return to Work Directives did. Whether or not these words were a predetermined signal to end the sick-out, the Return to Work Directives were the Contemnors' first good faith efforts to comply with the terms of the TRO.

40. The Court finds that there was nothing that prevented the Contemnors from promptly complying with the TRO by sending the February 12 Return to Work Directives on

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[132] *Id.*; April 15 Transcript, page 135.

[133] *Id.*

February 10 and thus ending the sick-out other than the Contemnors' willful and deliberate refusal to obey the TRO.

41. The evidence before the Court shows that even after the Contemnors got serious about complying with the TRO (by issuing the Return to Work Directives), the APA membership was confused because the Contemnors' pre-TRO communications reasonably could be interpreted to mean that they could ignore such a communication. This confusion is evident from exhibits that include messages from individual APA members to the APA asking for clarification of the Return to Work Directives[134] and responsive communications from the APA that the Union was indeed serious that the pilots should immediately clear the sick list and do everything the they could to return American to its normal flight schedule.[135] These communications substantiate that the APA's entire course of conduct had the effect of delaying and frustrating compliance with the TRO.

42. The Court finds that the Defendants ended their contempt of the Court's TRO at approximately 8:00 p.m., Central Time, on February 12, 1999 by complying with the Court's TRO. As the Court has found, that is when the February 12 Hotline Message was sent. The remainder of the Return to Work Directives were also sent near that same time.[136]

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[134] See, e.g., Plaintiff's Exhibit 33, an e-mail sent at 9:41 p.m. on February 12: "How about sending us a non-domicile rep (hint) message if you guys really mean this."

[135] See, e.g., Plaintiff's Exhibit 34, an e-mail sent on February 13 by Defendant Breslin: "Fellow Pilots, I have received a plethora of email from pilots who questionthe sincerity of my order to clear the sick list. I will reiterate in no uncertain terms: CALL AND CLEAR FROM THE SICK LIST! Judge Kendall has found APA in contempt of court and levied a $10 million dollar fine against the APA . . ." (emphasis original).

[136] Thus, the contempt period ran from 7:30 p.m., Central Time, on February 10 until 8:00 p.m., Central Time, on February 12.

43. The Court finds that after the Contemnors issued the Return to Work Directives to the pilots, large numbers of pilots on the sick list contacted American, cleared the sick list, and generally made themselves available to fly as soon as possible by acting in ways in which they normally act in performing their jobs.[137] The vast majority of pilots did not wait to clear sick until 4:00 p.m. on the day before their next scheduled sequence as Contemnors' experts suggested would be their "normal work schedule."[138] Instead, once the APA gave the pilots the signal to end the sick out by issuing the Return to Work Directives in the evening on February 12, there was a mass clearing of the sick list.[139] Consequently, there was an immediate and mass return to actual flying under the company's normal operating procedures after the Return to Work Directives were issued on February 12.[140] The Court finds that this was accomplished because the pilots had the option to freely clear the sick list without waiting until 4:00 p.m. on the day before their next scheduled sequence to clear,[141] to volunteer to move or waive duty free periods,[142] and to fly on days off.[143] This is all counter to the

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[137] Plaintiff's Exhibit 43. Plaintiff's Exhibit 51.

[138] Plaintiff's Exhibit 51. April 15 Transcript, pages 152-153.

[139] April 15 Transcript, page 149; pages 152-153. Plaintiff's Exhibit 51.

[140] April 15 Transcript, page 148.

[141] Plaintiff's Exhibit 51. April 15 Transcript, page 149; pages 52-153.

[142] April 15 Transcript, pages 146-147.

[143] April 15 Transcript, page 147. April 15 Transcript, page 166. April 15 Transcript, pages 53-54. See also Plaintiff's Exhibit 46, which demonstrates the number of pilots who would have been available to fly during the period from 12:01 a.m. on February 11 through February 15 if they had cleared the sick list immediately on February 10 after the TRO was issued. April 15 Transcript, pages 153-156. Plaintiff's Exhibit 46 takes into account the options the pilots had available to them to become available to fly on those dates listed on the exhibit: reserve availability,

Contemnors' damage theory and testimony and also shows that the Contemnors understood the Court's TRO directive to get the airline flying immediately. [144]

44. The Court heard expert testimony from Geoffrey Heal and Robert Mann, Jr., expert witnesses for Defendants.[145] The Court hereby finds that the testimony of Robert Mann, Jr. and Geoffrey Heal was unbelievable, untrustworthy and unreliable under Fed. R. Evid. 702.[146] See, *Kumho Tire Co.*,

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people on days off, people who had movable duty free periods, people who were available to fly their own scheduled sequence, and people who were on duty free periods who would have been asked to move them. April 15 Transcript, page 156.

[144] It is preposterous for Defendants to claim that they did not understand the Court's TRO directive to be that American's airplanes must start flying again without delay. In open court on February 10, 1999, the Court made the following statement as its final words for the day after announcing that it was granting the TRO: "But we're going to grant the temporary restraining order. Y'all need to get those airplanes flying quickly. Okay? We'll be in recess." February 10 Transcript, page 89. Whether you use the term "immediately," "quickly," or some other synonym, certainly no one with a straight face could argue that 48 hours and a couple of thousand canceled flights later was what was ordered

[145] Mr. Heal's testimony is found at pages 45-86 of the April 12 Transcript. Mr. Mann's testimony is found at pages 88-134 of the April 12 Transcript and at pages 3-82 and pages 216-226 of the April 15 Transcript.

[146] The Court finds the testimony of Robert Mann, Jr. to be particularly untrustworthy. For example, with respect to Defendants' Exhibit 11, Mr. Mann affirmatively testified that he put Exhibit 11 together between April 12 and April 15, 1999. April 15 Transcript, page 3. His intent was to leave the Court with the impression that the work product was his. However, the Court later discovered that a contracts administrator for the APA, and not Mr. Mann, generated Defendants' Exhibit 11. April 15 Transcript, pages 24-26. This was only discovered by the Court because the witness could not explain the exhibit to the Court which he represented he generated. April 15 Transcript, pages 8-24. Similarly, Mr. Mann also testified that it was publicized to the public in January of 1999 that a potential disruption to American's operations might occur due to the

Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 1174-75, 143 L.Ed.2d 238 (1999) (concluding that the gatekeeping principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) apply to all expert testimony and not just testimony based on "scientific" knowledge).[147] The Court rejects Mann's and Heal's testimony for the following reasons:

a. The Court finds that the methodology employed by both Mann and Heal was unreliable. Mann's and Heal's attempts to calculate damages based solely on the number of pilots who called in sick after the February 10 communication are unreliable.[148] Their theory rests on the false premise that the contempt damages are not also affected by the Contemnors' failure to get the more than 2,200 other "sick" pilots to clear the sick list and take action to restore normal operations.[149]

Reno acquisition issue. April 15 Transcript, pages 74-75. Yet, Defendant Norman Patterson, who admitted that he helped orchestrate the sick-out, testified that he gave the flying public no notice of the planned sick-out. February 12 Transcript, pages 173-174. American's Vice- President of Operations, Planning and Performance, Timothy J. Ahern, testified that he did not know about the sick-out in advance. April 15 Transcript, page 168. He further testified that he did not think the public knew of the sick-out in advance either. *Id.* The Court notes that it is likely that probably several hundred thousand travelers could be located who could and would testify that they did not know about the sick- out in advance.

[147] If this were a jury trial, the Court would not allow these witnesses' testimony under *Daubert* and its progeny. Furthermore, in this case, as factfinder, the Court finds them not credible in any event.

[148] April 12 Transcript, pages 50-52; pages 72-73; pages 79-81; pages 101-103. April 15 Transcript, page 63.

[149] April 12 Transcript, page 74; pages 79-80. Moreover, Mr. Mann's opinions assumed that the Court's TRO meant that the pilots would take their normal time in returning to work under the "normal interpretation" of the parties' collective bargaining agreement. April 15 Transcript, pages 39-40. Incredibly, Mr. Mann made this assumption even though he recognized that the Court had ordered the sick-out to immediately cease

As one of American's experts stated at the hearing, it was going to take American approximately three days to rebuild its schedule, regardless of when the pilots returned to work.[150] By waiting until the evening of February 12, 1999 to direct the pilots to clear the sick list, the Contemnors delayed that process of rebuilding the American Airlines schedule by two days by not effectively directing the pilots to clear the sick list and take action to assist in restoring normal flight operations.[151] It is these damages for which they are responsible. Also, the Court notes that one of Defendants' witnesses, a contracts administrator for the APA, testified that there was nothing in the parties' current CBA which prevented the same recovery that began after 8:00 p.m. on February 12 from starting two days earlier after 8:00 p.m. on February 10.[152] "A journey of a thousand miles must begin with a single step."[153]

b. The Court finds that Mann and Heal's testimony was inherently and irreconcilably contradictory. These two experts conflicted on their theory of the harm caused to American by a magnitude of six.[154] Offering damages

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and the planes to start flying again immediately. April 15 Transcript, pages 39-40.

[150] April 15 Transcript, page 163.

[151] Plaintiff's Exhibit 44. Plaintiff's Exhibit 45. April 15 Transcript, pages 142-144. Plaintiff's Exhibit 44 demonstrates that had the pilots cleared the sick list and otherwise resumed flying for American on February 10 as they did on February 12, the airline would have recovered operations two days earlier and 2279 flights would not have been canceled. April 15 Transcript, page 138.

[152] April 15 Transcript, page 127.

[153] Lao-tzu (circa 575 B.C.)

[154] Mr. Mann testified that under his methodology, he determined that there were approximately 680 cancellations as a consequence of 233 new sick calls, which translates roughly into about three cancellations per new caller to the sick list. April 15 Transcript, page 70. He further testified

theories where one expert's conclusion regarding the number of cancellations caused is six times larger than the other and where one expert's theory of damages is almost two times larger than the other leaves the Court to decide which, or if both, of Contemnors' experts is wrong. In this case, the Court has determined and so finds that both Mr. Mann and Dr. Heal are wrong.[155] Therefore, the Court finds their ultimate opinion on the damages inflicted on American unreliable.

c. The Court finds Robert Mann's testimony regarding the reasons the sick list did not begin to decline after the February 11 Communications particularly not credible and unreliable. Mann's reliance on "normal working schedule"[156] under the "Green Book"[157] flies in the face of reality. As the Court found above, when the Contemnors finally ordered the pilots back to work on February 12, the pilots began to clear sick, starting after 8:00 p.m.; the pilots did not wait until 4:00 p.m. on the day before their next scheduled sequence before calling in to clear the sick list.[158] The conduct of the pilots in moving their duty free periods, waiving duty free periods, and

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that Dr. Heal determined that there was only one flight cancellation for every two calls. *Id.* Thus, Mr. Mann's determined cancellation rate was six times greater than Dr. Heal's cancellation rate. April 15 Transcript, Transcript, pages 70-71. In other words, Mr. Mann determined that the number of cancellations caused by the 233 new pilots who called in sick after the February 10 communication was six times greater than Dr. Heal determined. Also, Mr. Mann's damage calculation was almost twice that to Dr. Heal's damage calculation. April 15 Transcript, page 222. Defendants' Exhibits 5, 8, and 9.

[155] April 15 Transcript, pages 222-226.

[156] Mr. Mann made this assumption even though he recognized that the Court had ordered the sick-out to immediately cease and the planes to start flying again immediately. April 15 Transcript, pages 39-40.

[157] The "Green Book" is the current CBA between American and the APA.

[158] Plaintiff's Exhibit 51. April 15 Transcript, pages 152-153.

flying on days off[159] is consistent with the immediate restoration of normal operations by getting the planes flying again immediately,[160] an objective the Court clearly communicated at the TRO hearing.[161] Mann's testimony and the assumptions that underlie his damages calculations are inconsistent with the objectives imposed on Contemnors by the TRO and the reality of the pilots' actions as evidenced by their conduct once they were directed to return to work on February 12.[162]

45. The Court bases its finding of damages upon the expert witness testimony of Timothy J. Ahern and Douglas G. Herring, both of American Airlines, Inc. Timothy Ahern is the Vice-President of Operations, Planning and Performance at American.[163] Douglas G. Herring is the Vice-President and Controller of American.[164]

46. The Court finds that the testimony of Mr. Ahern and Mr. Herring was credible, reasonable, reliable, and trustworthy under the provisions of Fed. R. Evid.702 and 703 with

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[159] April 15 Transcript, page 166. Mr. Mann even recognized that when pilots began clearing the sick list after the contempt proceeding of February 12, many of those pilots likely as made themselves available to fly on duty free periods and on days off. April 15 Transcript, pages 53-54.

[160] April 15 Transcript, page 166.

[161] By communicating at the TRO hearing that the planes needed to start flying again quickly (February 10 Transcript, page 89), the Court was, of course, telling Defendants that the American system needed to be restored to its normal operations in quick and immediate fashion. Given the context of coming to Federal court for extraordinary relief, it was clear to everyone in the courtroom that immediate system restoration to end the bleeding was what was contemplated and indeed ordered. The written TRO is equally clear. To suggest otherwise, like suggesting the sick-out was "spontaneous," is disingenuous.

[162] Plaintiff's Exhibit 44. April 15 Transcript, pages 148-149.

[163] February 12 Transcript, page 12.

[164] February 17 Transcript, page 37.

the limitations noted below. See, *Kumho Tire Co., Ltd.*, 526 U.S. at __-__, 119 S.Ct. at 1174-75 (concluding that the gatekeeping principles of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) apply to all expert testimony and not just testimony based on "scientific" knowledge).

a. The Court finds that the methodologies and conclusions of Timothy J. Ahern and Douglas G. Herring are credible, reasonable, reliable, and trustworthy under the provisions of Fed. R. Evid. 702 and 703. See also *Hudson Transit Lines, Inc. v. Freund*, 509 F.Supp. 1172, 1178-79 (E.D.N.Y.1981) (awarding lost revenue contempt compensation); *Long Island R.R. Co. v. Bhd. of R.R. Trainmen*, 298 F.Supp. 1347, 1350 (E.D.N.Y.1969) (awarding lost revenue as contempt compensation in an RLA case).

b. The Court credits the evidence and believes that the overall damages that were caused by the ten day work stoppage were approximately $200 to 250 million, as American reported to the investment community. [165]

c. The Court accepts and finds as fact Mr. Herring's evidence that American suffered losses of $50.96 million from the two day extension of the sick-out caused by the contempt.[166] The compensatory contempt damages for the two day extension of the work stoppage are calculated as the difference between the revenue that American would have received had the Contemnors complied with the Temporary Restraining Order when it was issued on February 10, 1999 at 4:00 p.m. and the revenue that American actually received during the period of contempt (with appropriate offsets for expenses incurred and expenses not incurred because the airline was not operating to capacity) ending at 8:00 p.m. on

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[165] See Exhibit 2 to Defendants' Exhibit 5 (the report of one of Defendants' expert witnesses, Geoffrey Heal).

[166] April 15 Transcript, pages 185-189. Plaintiff's Exhibit 48.

February 12, 1999.[167] The Court, however, makes the following deductions to American's damage figure to give the Contemnors the largest benefit of the doubt possible:

(i) The Court finds that it is appropriate in this matter to apply a 6% reduction to American's revenue losses based on Mr. Herring's testimony that 6% was the largest margin of error Mr. Herring had ever experienced in projecting American's revenue over the 13-14 month period prior to the April 15, 1999 hearing.[168] The Court finds that despite the fact that Mr. Herring testified that he was correct to 1-2% over the past 12 months prior to the April 15, 1999 hearing,[169] it is appropriate to give the Contemnors the benefit of this unusually large 6% error rate.[170]

(ii) The Court finds that is also appropriate, under these circumstances, to reduce the adjusted American loss figure by five percent (5%) for "booking away" revenue losses resulting from pre-TRO sick-out activity.[171]

(iii) The Court finds that, after an exhaustive review of the evidence before it, there exists no other valid deduction in the losses suffered by American.[172]

47. The Court finds that, after the deductions described above are taken, American has suffered Forty-five Million, Five Hundred Seven Thousand, Two Hundred Eighty Dollars ($45,507,280.00) in lost revenue, unnecessary costs and

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[167] April 15 Transcript, pages 185-194; page 213. Plaintiff's Exhibits 47-50. February 17 Transcript, pages 40-41; pages 47-49.

[168] April 15 Transcript, page 210.

[169] April 15 Transcript, page 209.

[170] April 15 Transcript, page 271.

[171] April 15 Transcript, pages 271-272.

[172] April 15 Transcript, page 272. The Court, as factfinder, therefore rejects any other arguments made by Defendants and their experts in support of lowering American's damage award.

expenses attributable to the Allied Pilots Association's, Richard LaVoy's, and Brian Mayhew's contempt of this Court's Temporary Restraining Order of February 10, 1999.[173] These damages result from the cancellation of 2,279 flights caused by contempt of the Court's TRO[174] and associated revenue losses on flights that were not canceled but which had a lower load factor (which resulted, for example, because passengers' connecting flights were canceled).[175]

48. The Court finds that the Contemnors are jointly and severally liable for these damages ($45,507,280.00).

49. The Court finds that there is insufficient basis in the evidentiary record for apportioning liability among the Contemnors.

50. The Court finds that Contemnors acted in concert in violating the TRO in that the APA violated the TRO in overwhelming part by virtue of the actions (and/or the inactions) of Defendants LaVoy and Mayhew.

51. The Court finds that Defendants LaVoy and Mayhew failed to cause the APA to comply with the TRO and are therefore responsible for the APA's disobedience of the TRO. Accordingly, Defendants LaVoy and Mayhew are as equally liable as the APA for the resulting contempt.52. The Court finds that LaVoy and Mayhew aided, abetted, and conspired with the APA to evade compliance with this Court's TRO, thereby rendering LaVoy, Mayhew, and the APA in contempt of Court.53. The Court finds that LaVoy, Mayhew, and the APA joined together to evade compliance with this Court's TRO, thereby rendering LaVoy, Mayhew, and the APA

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[173] April 15 Transcript, pages 272-273.

[174] Plaintiff's Exhibit 44. April 15 Transcript, page 138; pages 142-144.

[175] April 15 Transcript, pages 189-193.

jointly and severally liable for the amount of damages resulting from their contumacious conduct.54. The Court finds that American should be awarded appropriate post-judgment interest on the amount of damages awarded.[176]

C. CONCLUSIONS OF LAW

1. Any above-listed Finding of Fact which should more properly be listed as a Conclusion of Law is hereby incorporated by reference and adopted as a Conclusion of Law.

STIPULATION OF "MINOR DISPUTE"

2. The parties have stipulated and agreed[177] (and the Court has so found[178]) that the dispute leading up to the issuance of the TRO was a "minor dispute" under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq. Because it was a "minor dispute," Defendants were prohibited by the RLA from engaging in the sick-out as they did.[179] The sick-out was thus an illegal job action.

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[176] The parties were asked by the Court to brief the issue of whether post-judgment interest should be awarded in this case with regard to the contempt compensatory damages. Plaintiff American filed a brief on June 21, 1999 arguing in favor of the awarding of post-judgment interest. Defendants did not file a brief. Defendants' counsel orally notified the Court on June 21, 1999 that no such brief would be forthcoming from Defendants.

[177] See Stipulation filed by the parties on April 28, 1999.

[178] Findings of Fact and Conclusions of Law of the Court, filed on February 13, 1999, page 1. Order of Contempt, filed on February 13, 1999, page 3. February 10 Transcript, page 51. Order Adopting Stipulation, filed May 7, 1999, page 1.

[179] See *Bhd. of R.R. Trainmen v. Chicago River & Ind. R. Co.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); *Burlington Northern R.R. Co. v. Bhd. Of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir.1992), cert. denied, 506 U.S. 1071, 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993).

CONCLUSIONS OF LAW RELATED TO CONTEMPT PROCEEDINGS

3. "An order issued by the Court with jurisdiction over the subject matter and person must be obeyed until it is reversed." United States Steel Corp., 598 F.2d at 368.

4. "The party seeking the contempt adjudication bears the burden of establishing the defendant's violation by clear and convincing evidence." *Black Diamond Coal Mining Co. v. Local Union # 8460, United Mine Workers of America*, 597 F.2d 494, 496 (5th Cir.1979).

5. "A sanction imposed to compel obedience to a lawful court order or to provide compensation to a complaining party is civil." *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1351 (2nd Cir.1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990), citing *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 91 L.Ed. 884 (1947). This is a civil contempt proceeding.

6. "The movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence: (1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order. Wilfulness is not an element of civil contempt. After the movant has shown a prima facie case, the respondent can defend against it by showing a present inability to comply with the subpoena or order." *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir.1987) (emphasis original) (citations omitted). The Plaintiff has met its burden in this matter by clear and convincing evidence.

7. A fine for civil contempt is a means to enforce a court order of injunctive relief, which in this case is the TRO. A fine for civil contempt may be compensatory in nature or may be designed to coerce behavior. See *United Mine Workers of*

America, 330 U.S. at 303-304, 67 S.Ct. 677 ("Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained"); see also *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961-62 (5th Cir.1995) ("Civil contempt can serve two purposes. It can be used to enforce compliance with a court's order through coercion, or it can be used to compensate a party who has suffered unnecessary injuries or costs because of contemptuous conduct"); *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir.1976) ("Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of the adversary's noncompliance"). To give a court the power to issue injunctive relief without the power to fine those individuals who disobey the court order is to give a court the power to grant a remedy without effective means to enforce it. When the gauntlet is thrown down to the authority of the Court and its lawful orders, the Court has no choice but to pick it up.

8. A court can issue fines to enforce injunctive relief, including a TRO.

9. "[O]nce the plaintiff has proved that he has suffered harm because of a violation of the terms of an injunction, compensatory damages are appropriate." *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2nd Cir.1979).

10. "The Court has broad discretion in the assessment of damages in a civil contempt proceeding. The purpose is to compensate for the damages sustained." The public rights that a court order seeks to protect are important measures of the remedy. See *Long Island R.R. Co.*, 298 F.Supp. at 1350.

11. The Court concludes that "[w]here compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the

compensatory fine is dependent upon the outcome of the basic controversy." *United Mine Workers of America*, 330 U.S. at 304, 67 S.Ct. 677. The "basic controversy" in the case before this Court (a suit for injunctive relief from an alleged illegal job action under the RLA) is not the dispute over the integration by American of Reno and the Scope Clause of the CBA. The basic controversy in this case is whether the APA was engaged in an illegal job action under the RLA and whether they should be ordered to stop via a TRO and Injunction after a hearing. This basic controversy was resolved in favor of American when the Court found and the APA later stipulated that this was a "minor dispute" under the RLA, thus making the APA instigated sick-out an illegal job action under the RLA. Furthermore, the parties have now asked the Court to enter an agreed injunction. If the TRO had been obeyed, the APA would not owe a dime because damages are not available under the RLA. But the Defendants are liable for damages as compensation for losses suffered because of their contemptuous acts of not obeying and ending the illegal sick- out when ordered.

12. "[C]ompensatory civil contempt reimburses the injured party for the losses and expenses incurred because of his adversary's noncompliance ... There must be evidence showing the amount of the loss, since the court must have some basis for determining both the amount and the reasonableness of the costs claimed." *Sebastian v. Texas Department of Corrections*, 558 F.Supp. 507, 510 (S.D.Tex.1983). In this matter, there is ample evidence showing the amount of the loss to American caused by Contemnors' contumacious conduct. Similarly, the Court concludes that the evidence shows that the amount of the loss American claims to have suffered because of Contemnors' contumacious conduct to be more than reasonable.

13. "In awarding a compensatory fine in a civil contempt proceeding, the question of amount falls within the broad discretion of the trial court." *Id.*, citing *Mead Johnson & Co.*

v. Baby's Formula Service, Inc., 402 F.2d 23 (5th Cir.1968). "Accordingly, it is the Court's duty to determine the amount which is reasonable in view of the circumstances." *Sebastian*, 558 F.Supp. at 510.

14. A union can be held in contempt "if the strike was conducted or encouraged by its members functioning as a union, by its agents acting within their apparent authority, or by those whose acts the Union can be held to have ratified by its inaction." *Black Diamond Coal Mining Co.*, 597 F.2d at 495. The same reasoning applies, as here, in an illegal sick-out job action.

15. "Ratification occurs where the union's efforts to return strikers are so minimal that the union's approval or encouragement may be inferred." *United States Steel Corp.*, 598 F.2d at 365. The "circumstances surrounding the strike may create an inference that the Union condones or ratifies the illegal activity and the Union will be held responsible by its failure to take measures to end the strike." *Black Diamond Coal Mining Co.*, 597 F.2d at 495. In this case, the Court finds ratification of the continued unlawful sick-out by the APA and, accordingly, the APA was in contempt of the TRO as set forth herein.

16. The TRO in this case applied on its face and was directed to Defendants APA, LaVoy, and Mayhew, among others. The TRO states in pertinent part: "IT IS ORDERED, that the Defendants, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, in concert with, through or under them, or by and through their orders, are hereby temporarily restrained ..."[180] There is no doubt that Defendants APA, LaVoy, and Mayhew were all equally bound by the terms of the TRO. Defendants APA, LaVoy, and Mayhew all received notice of the TRO, failed to comply with the TRO, and are consequently all guilty of contempt. Defendants APA, LaVoy, and Mayhew

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[180] TRO, pages 2-3.

are responsible for the damages suffered and for disobedience to this Court's lawful Order, the TRO. "So long as the defendants knew the court was enjoining them and were cognizant of the terms of the injunction, they are responsible for the consequences." *Carousel Handbags*, 592 F.2d at 129 n. 5.

17. A business entity's officers can be held in contempt for their failure to cause their corporation (or an unincorporated association in this case[181]) to comply with a court's order. *Wilson v. United States*, 221 U.S. 361, 376-77, 31 S.Ct. 538, 55 L.Ed. 771 (1911); *Connolly v. J.T. Ventures*, 851 F.2d 930, 935 (7th Cir.1988) ("a command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt"); See also *N.L.R.B. v. Maine Caterers, Inc.*, 732 F.2d 689, 691 (1st Cir.1984) ("[A]n officer, responsible for the corporation's affairs and for its disobedience, may be held liable for contempt.") As evidenced by the contumacious conduct set forth in the Findings of Fact above, Defendants LaVoy and Mayhew failed to cause the APA to comply with the TRO and are therefore responsible for the APA's disobedience of the TRO. Accordingly, Defendants LaVoy and Mayhew are as equally liable as the APA for the resulting contempt.

18. "[A]ny party who knowingly aids, abets, or conspires with another to evade an injunction or order of a court is also

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[181] The Court notes that in *Terry*, the leader of an entity not organized in corporate or partnership form named as a defendant in that case (Operation Rescue) was held in contempt and was held jointly and severally liable with the entity for the sanctions imposed. *Terry*, 886 F.2d at 1351-52.

in contempt of that court." *N.L.R.B. v. Laborers' International Union of North America, AFL-CIO*, 882 F.2d 949, 954 (5th Cir.1989). As evidenced by the contumacious conduct set forth in the Findings of Fact above, the Court finds that LaVoy and Mayhew aided, abetted, and conspired with the APA to evade compliance with this Court's TRO, thereby rendering LaVoy, Mayhew, and the APA in contempt of Court.

19. The Court concludes that in determining the loss to American because of the Contemnors' actions, the Court should "determine whether a reasonable person could find the [revenue losses] were established with reasonable certainty." *DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 329 (5th Cir.1997); see also *Thompson and Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 435 (5th Cir.1996) (same).

20. The Court concludes that "it is not necessary that recovery for future [revenue losses] should be established by exact calculation, as it is enough to have data from which these [revenue losses] may be ascertained with a reasonable degree of certainty and exactness." *Fiberlok, Inc. v. LMS Enterprises, Inc.*, 976 F.2d 958, 962 (5th Cir.1992).

21. The Findings of Fact regarding the amount of compensatory damages American has suffered as a result of the contempt ($45,507,280.00) are made with reasonable certainty based upon the evidence submitted.

22. The Court finds that the Contemnors are jointly and severally liable for the amount of compensatory damages American has suffered as a result of the contempt ($45,507,280.00).[182]

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[182] Defendants have repeatedly made various arguments to this Court which they allege preclude the awarding of compensatory damages to American as a result of Defendants' contempt in this case. For example, Defendants have argued that American cannot recover compensation from

the APA in a civil proceeding, including a civil contempt proceeding, because of the "RLA's proscription against monetary recoveries by employers against unions." Defendants' Memorandum in Support of their Motion to Dismiss Compensatory Civil Contempt Claims and to Remit or Vacate Fines already Assessed, filed April 6, 1999, page 12. This Court flatly rejects this argument. To begin with, if this Court were awarding "damages" for violating the RLA, the number would be in the neighborhood of $200-250 million for the total time the illegal sick-out was conducted. Furthermore, other courts have rejected similar types of arguments: "A plaintiff's right to a compensatory fine is contingent upon the outcome of the main cause. (citations omitted). However, this does not mean that since damages are not recoverable in a Title VII action, a compensatory fine may not be levied for noncompliance with an injunction in a Title VII case." *Sebastian*, 558 F.Supp. at 509, citing *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). In fact, at least one other court has awarded compensatory damages as a sanction in a civil contempt proceeding in which the underlying proceeding involved the RLA. See *Long Island R.R. Co.*, 298 F.Supp. at 1350. This Court may of course award compensatory damages to American which result from Defendants' contumacious conduct. Were it otherwise, this Court, and other courts, would be faced with only being able to issue toothless injunctions without a means to enforce them. The Defendants cited no authority, and the Court could find none, in the 70 plus years of RLA jurisprudence that even remotely suggests that in a RLA case a transportation industry union is granted "King's X" for disobedience of a court order and consequent damages. Thus, this Court similarly rejects Defendants' argument (as set forth in Defendants' Memorandum of Law in Opposition to Imposition of Joint and Several Liability on Defendants' LaVoy and Mayhew, filed April 28, 1999) that holding Defendants LaVoy and Mayhew jointly and severally liable for the compensatory damages awarded in this case would conflict with federal statutes and policy barring individual liability and damages against union officials and members for unlawful work stoppages. Defendants' reliance upon *Complete Auto Transit v. Reis*, 451 U.S. 401, 101 S.Ct. 1836, 68 L.Ed.2d 248 (1981), *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962), and the Norris-LaGuardia Act is therefore misplaced, inapplicable, and inappropriate in the context of a civil contempt proceeding. The money is not being ordered paid because of the illegal work stoppage, but for the damages caused by not ending it when ordered to do so by a federal court.

23. Where parties "join together to evade a judgment, they become jointly and severally liable for the amount of damages resulting from the contumacious conduct." *Laborers' International Union of North America, AFL-CIO*, 882 F.2d at 955. The Court finds that LaVoy, Mayhew, and the APA joined together to evade compliance with this Court's TRO, thereby rendering LaVoy, Mayhew, and the APA jointly and severally liable for the amount of damages resulting from their contumacious conduct. Moreover, since the TRO in this case applied on its face to Defendants APA, LaVoy, and Mayhew, and since the APA, LaVoy, and Mayhew all had actual knowledge of the TRO and failed to comply with it as set forth above, LaVoy, Mayhew, and the APA are jointly and severally liable for the amount of damages resulting from their contumacious conduct.

24. The Court concludes that the Contemnors are not entitled to mitigate the damage they have inflicted on American by arguing that they intended to comply with the TRO because "the mental state of the violator should not determine the level of compensation due." *Cook v. Ochsner Foundation Hosp.*, 559 F.2d 270, 272 (5th Cir.1977). The law requires the Contemnors to pay for what they have broken.[183] *Jim Walter Resources, Inc. v. International Union, United Mine Workers of America*, 609 F.2d 165, 169 (5th Cir.1980) ("What they did as a group, they are responsible for as a group"—assessing civil contempt fine against union for violating TRO).

25. "[A] civil contempt fine may not exceed the actual loss to the complainant caused by the actions of respondent, lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding." *Laborers' International Union of North America, AFL-CIO*, 882 F.2d at

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[183] Defendant LaVoy also acknowledged to the Court that the concept of "we should all pay for what we break" is "a fair statement." February 12 Transcript, page 67.

955. The Court has taken great pains to make sure that the compensatory damages awarded to American do not exceed the actual loss to American caused by Defendants' contumacious conduct. This is because this is a civil contempt proceeding and not a criminal contempt proceeding. No one is going to jail and not one dime is being paid to the government as a fine because of the contumacious conduct of the Defendants.

26. 28 U.S.C. § 1961(a) states in pertinent part that "[i]nterest shall be allow on any money judgment in a civil case recovered in a district court." Under this statute, post-judgment interest must be awarded to American. *Reeves v. International Tel. & Tel. Corp.*, 705 F.2d 750, 752 (5th Cir.1983) (per curiam) (post-judgment "interest was allowable of right, not as a matter of discretion"); See *Sebastian*, 558 F.Supp. at 513 (awarding post-judgment interest on a compensatory award of damages for civil contempt).

These Findings of Fact and Conclusions of Law are hereby adopted and made the Findings of Fact and Conclusions of Law of this Court.

D. CONCLUSION

After taking the entire record into account and after making the Findings of Fact and Conclusions of Law set forth above, Defendants APA, LaVoy, and Mayhew are accordingly held responsible for their contemptuous actions in violating this Court's TRO. This Court therefore awards to American the compensatory damages which are attributable to these Defendants' contemptuous actions. This Court awards American $45,507,280.00 in such compensatory damages, and Defendants APA, LaVoy, and Mayhew are held jointly and severally liable for these damages. Post-judgment interest at the rate of 4.879% is also awarded to American until the Judgment is paid. A Judgment Awarding Compensatory Damages For Civil Contempt is being entered by the Court concurrently herewith.

Supreme Court, U.S.
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No. 00-1016

IN THE

Supreme Court of the United States

ALLIED PILOTS ASSOCIATION,
RICHARD T. LAVOY,

AND

BRYAN A. MAYHEW,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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40 pp

QUESTION PRESENTED

Whether the district court provided adequate notice and opportunity to petitioners to be heard on the questions of liability and compensatory damages for premeditated civil contempt of the district court's order requiring the petitioner Allied Pilots Association to take all reasonable steps to end an illegal sick-out by members of the Association.

RULE 29.6 STATEMENT

Respondent American Airlines, Inc. is a wholly owned corporate subsidiary of AMR Corp. Neither American Airlines, Inc. nor AMR Corp. has any non-wholly owned, publicly-traded subsidiaries.

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IN THE

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AMERICAN AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

The respondent, American Airlines, Inc., submits this brief in opposition to the petition for a writ of certiorari in this case.

RESTATEMENT OF THE CASE

Petitioners' recitation of the factual and procedural history of this case is inadequate. They received far more due process than they profess in their Petition, and much more than the exigencies of the case legally required. It is difficult to imagine a case where there has been a more premeditated effort to defy and circumvent a federal court order. Contrary to what the Association says, the district court issued a straightforward TRO requiring the Association to disengage from an illegal sick-out and return to work immediately. The President of the Association initially misrepresented the

Association's sponsorship of the sick-out to the trial court, only later to have the Association's counsel recant when confronted by irrefutable evidence of the Association's misconduct. At the time of the TRO hearing, American produced internal Association e-mails describing how the Association membership could evade any TRO the court might issue. If not for the timely intervention of the district court, the Association would have succeeded in its lawless effort to disable American and to maintain a prolonged disruption of the nation's transportation system.

A. Restatement Of The Nature Of The Proceedings Below

This case arises out of contempt proceedings to halt premeditated, concerted and temporarily successful defiance of a federal court order. On February 10, 1999, American obtained a temporary restraining order against its pilots' Association (the "APA"), together with the APA's President ("LaVoy"), Vice President ("Mayhew"), and Board of Directors under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"), to halt the APA's illegal sick-out against American. The sick-out caused American to cancel thousands of flights, stranding hundreds of thousands of passengers and costing the Company over $250 million. The TRO was issued fully in accord with the Federal Rules of Civil Procedure. When it became apparent that the district court would enjoin the sick-out, LaVoy assured the court that the Association would obey the order. APA counsel then assisted in drafting the TRO. The sick-out actually worsened *after* the TRO was entered.

American sought on February 11, 1999, and the district court convened on February 12, a show cause hearing where petitioners appeared and presented their defense to the short and plain allegation of contempt. In all, nine members of the

APA leadership appeared, including LaVoy and Mayhew.[1] The district court conducted a full-day evidentiary hearing on February 12, 1999, at which ten witnesses (including LaVoy and Mayhew) testified. The defendants cross-examined four of the witnesses and passed the opportunity to examine six others. American and APA introduced four and three exhibits, respectively. American had already attached to its TRO papers three Association e-mails detailing how the Association membership could evade any TRO issued by the Court. The district court then adjourned to consider fully the evidence before preparing the findings of fact and conclusions of law that it issued the following day.

In its findings, the district court carefully weighed the evidence and declined to hold several individual defendants, who testified, in contempt, while making a contempt finding against LaVoy, Mayhew and the APA. The district court also deferred any finding with respect to numerous individual defendants who did not appear. The district court then held a damages hearing on February 17, 1999, where it heard the direct and cross-examination of American's two damages experts and admitted ten exhibits. At petitioners' request, the proceedings were continued for two months to permit them to conduct extensive document discovery—in response to which American produced more than 12,000 pages of documents, boxes of microfiche records and a zip disk of computer data—and to prepare their own expert witnesses. The district court reconvened in April 1999 for two days of testimony, during which APA had a second opportunity, after weeks of studying the underlying data, to examine American's damages witnesses.

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[1] Also present were: APA Treasurer Robert Morgan, DFW Domicile Chair and Vice Chair Norm Patterson and Larry Foster, and the National Negotiating Committee: Michael Mellerski, John Darrah, Leonard Turcotte, and Kent Michaelson.

On June 23, 1999, the district court entered a Judgment Awarding Compensatory Damages for Civil Contempt and a Memorandum Opinion (Containing Findings of Fact and Conclusions of Law) and Contempt and Damage Order. (Pet. App. 39a) The court found that during the period of Petitioners' contempt, American suffered $45.5 million in direct damages from the contempt and that LaVoy and Mayhew were jointly and severally liable with the APA for failing to use their best efforts to halt the sick-out that they instigated. (Pet. App. 12a) In the court of appeals, petitioners did not contest the amount of compensatory damages awarded by the trial court.

B. Restatement Of Relevant Facts

Even in the context of contentious labor disputes, this is an extraordinary example of a union's efforts to defy a court order—an order that it knew would be issued—to end what it knew was an illegal job action. Despite the illegality of its actions, the APA nonetheless knowingly instructed its members to ignore any court-ordered return to work.[2]

1. The APA Organized The Sick-Out And Advised Its Members To Defy Any Injunction

The APA relied on e-mail and an aggressive phone tree to organize the sick-out.[3] In addition to directing its members to

---

[2] Petitioners possibly gambled that they would face only coercive fines that could be purged by compliance, allowing the Association to strike a crippling blow to American without sustaining any damage to itself. *See* App. 57a (APA Board Member Foster admitting sick-out was organized "for the express purpose of economically damaging American Airlines 'to get [American] off the dime.'").

[3] The leadership of the APA consists of a President, Vice President, and Board of Directors, which is comprised of representatives from American's hubs, including San Francisco, Los Angeles, Chicago, New York, Miami and Dallas–Fort Worth. The APA maintains a comprehensive communications network with rank-and-file members. It delivers

call in sick, the APA advised pilots to defy any back-to-work injunction. The Association's efforts to pre-condition its members to defy a back-to-work order are a cornerstone of the opinion of the court of appeals. On February 5, 1999, an APA director sent the following e-mail (the three e-mails referenced are attached in an appendix) to the Los Angeles-based pilots, advising them that:

> It is possible that a Federal Judge will enjoin the APA from an alleged illegal job action. If that happens it does NOT mean that you, as an individual, may return to work if you still feel too stressed to perform safely in the cockpit. Remember the FAA has given YOU the final determination whether or not you are fit for flying duty.

(Resp. App. 6a) This campaign to defy any court order was Association-wide. Dallas-based pilots were likewise warned to ignore any injunctions:

> THINGS TO CONSIDER: It is possible that management will file an injunction against APA. That does not mean that you must fly if you are "sick."

(Resp. App. 3a)

Against this backdrop of premeditated contempt, the APA organized its illegal sick-out. Miami-based pilots were advised that:

> Today, February 5, 1999, is the "line in the sand."
>
> * * *
>
> We can no longer ask you to withhold expressing your indignation at AMR's failure to respect your contractual rights.

"blast" e-mails to its pilots, maintains an internet web-site where it posts communications, operates a toll-free "hotline" to make recorded messages available, and houses facilities where APA volunteers operate phone trees (placing outgoing calls) and phone watches (accepting incoming calls). Each domicile has similar communications capability.

* * *

> Hopefully, your resolute actions will bring this odious situation to an end.

(Resp. App. 1a)

In a similar vein, Dallas-based pilots were told that the Association needed to send a signal to American:

> There has been a great deal of stress associated with these actions by management. We are all feeling its ill effect and, in the absence of an adequate remedy, APA leadership is asking all pilots system-wide to consider whether they are 100% capable of performing their duties in the cockpit. Remember, self-assessment of your physical and mental well-being is your obligation under Federal Law. If you find yourself unable to perform your duties, you should consider your contractually available options—prior to your next scheduled trip.[4]

(Resp. App. 2a)

Los Angeles pilots were instructed to place themselves on the sick list and to encourage other pilots to do so:

> APA leadership is asking pilots SYSTEM-WIDE, to assess whether they are at 100% capacity to perform their professional duties in the cockpit. If you find yourself unable to perform your duties at 100% you should consider calling in sick.
>
> * * *
>
> If you decide that you are unfit to fly your next trip, and MOST pilots probably are, then you should contact crew schedule immediately to let them know you are SICK.

---

[4] The message continued: "Your Union needs your help to convince management of our collective resolve . . . . Sick is defined by Webster as: sick: a) affected by disease b) spiritually unsound c) sickened by strong emotion d) depressed e) lacking vigor. Do you meet this definition? If so, avail yourself of your negotiated rights." (Resp. App. 3a-4a)

* * *

> Fellow LAX pilots, we are asking each of you to assist in spreading the word. When you receive this message, please consult your hard-copy Domicile Roster and make an effort to personally speak to at least three pilots above and below you.
>
> * * *
>
> The Domicile Telephone Committee will be looking for help. If contacted, please assist. It is a small investment for our contract and our careers.

(Resp. App. 5a-7a)

The sick-out began as scheduled on February 5, 1999. The APA Board of Directors led by example, with twelve of 16 members calling in sick. American cancelled five flights on February 5 because of the sick-out. On February 6, cancellations rose to 84 and then to 246 on February 7.

Still unsatisfied, LaVoy rallied the troops with a Hotline message on February 7:

> First, there's been a dramatic increase in the reassignment of pilots on days off, as getting pilots into the cockpit by any means has become the only alternative to canceling flights. With that said, line holders keep in mind that our contract does not obligate pilots to be available to answer or return phone calls on days off . . . Second, another unfortunate aspect of this ongoing pilot shortage is management pressuring pilots into flying when the pilots have deemed themselves not physically fit to fly. We simply cannot allow anyone to pressure us into flying when we are not medically fit because it would be a serious violation of Federal Air Regulations . . .

(R. 67-70)

These communications, all of which American submitted to the district court with its TRO papers on February 9, 1999, reveal the APA's premeditated strategy to stage an illegal

job-action and commit contempt if enjoined.[5] The strategy succeeded. On February 8, American cancelled 505 flights. On February 9, American cancelled 827 flights, bringing the total cancellations at that time to 1,662. Facing these cancellations and the prospect of mounting disruptions to its operations, American went to the district court on February 10, 1999.

Despite his knowledge of and complicity in the Association's organized sick-out, LaVoy represented to the district court at the February 10 TRO hearing that the APA had little to do with the sick-out and that it was a "truly . . . spontaneous," "grassroots" action by the pilots. [Feb. 10 Tr. 45:18-24] Counsel for the APA later conceded that the Association planned and organized the sick-out, knowing the job action was over an RLA minor dispute and thus illegal. [Apr. 12 Tr. 31:13-17]

2. Petitioners Defied The Restraining Order

The TRO required the named defendants and anyone working for or with them to take "all reasonable steps within their power" to prevent continuation or encouragement of the sick-out. The TRO also specifically required that petitioners: "instruct all pilots to resume their normal working schedule;" notify all APA-represented pilots by the "most expeditious means possible" of the contents and meaning of the TRO; include in the latter communication a directive "to cease and

---

[5] Petitioners' repeated attacks on the district court for admitting post-TRO evidence of Petitioners' defiance of the TRO is a red herring. (Pet. 11-13) While the district court cited these corroborating e-mails in its findings of fact, they are not discussed here because they formed no basis for the court of appeals decision. The court of appeals noted that the three e-mails and LaVoy's Hotline message, all in the record at the time the TRO issued, coupled with the escalating sick-out numbers post-TRO, sufficiently evidenced Petitioner's contempt and thus mooted their due process complaints concerning the e-mails American subsequently obtained in discovery. *See* App. 15a and n.15.

desist" the sick-out; post the communication on the APA's web site; include the contents of the TRO ordering paragraphs in all telephone hotlines APA operated; report to the district court by noon on February 12, 1999 the methods used to effect the notice required by the TRO; and furnish copies of the notice and reports to American. (Pet. App. 29a-30a)

Petitioners fully participated in drafting the TRO and agreed to its form. Unaware of their premeditated strategy of defiance, at the February 10, 1999 session Judge Kendall stated, "I am trusting as a man of honor Captain LaVoy's representation to me that his pilots are going to do whatever I order." [Feb. 10 Tr. 89:13-15] The district court then concluded the hearing by stating: "Y'all need to get those airplanes flying quickly. Okay?" [Feb. 10 Tr. 89:23]

In response to the TRO, the APA posted a notice on its web-site and recorded a message for the Hotline (the "February 10 Communications") at 7:30 p.m. on February 10, 1999, stating that the TRO applied only to the APA and its Officers and Directors:

> This is Rich LaVoy with the APA Information Hotline for Wednesday, February 10. The time is approximately 7:30 P.M. Central. Early this afternoon in Dallas, U.S. District Court Judge Joe Kendall issued a Temporary Restraining Order ***enjoining APA from "concerted action."*** The Judge's action was in response to a filing by AMR management. Our attorneys are now reviewing this document. It is important to bear in mind that this order does not constitute a judgment on the merits of the contractual dispute and should have no effect on either side's bargaining position. Also, ***please be aware that where the court order refers to "defendant," it is referring to APA's National Officers, Board of Directors, Negotiating Committee, and General Counsel.***
>
> * * *

> Today's ***legal maneuvering*** by management does not bring us any closer to our goal of a negotiated settlement.

(R. 728 (emphasis added))

LaVoy recorded another Hotline and posted a second website message at 2:00 p.m. on February 11, 1999 (the "February 11 Communications") identical to the February 10 Communications, except for deletion of the statement that the TRO applied only to the APA, National Officers, and Board of Directors. The February 11 Communications still stated the TRO did not "constitute a judgment on the merits of the . . . dispute" and continued to describe the TRO as "legal maneuvering by management." [Feb 12 Tr. at 209 (Exh. B to Defs.' Exhibit 3 in contempt hearing)]

Petitioners represent the February 11 Communications as a "full TRO notice/return-to-work directive" and insist that they complied with the TRO.[6] (Pet. 6) Petitioners did not, however, reverse any of the affirmative steps they had taken to instigate the sick-out: they did not send any blast e-mails; they did not activate the phone tree; they did not retract their instructions to defy any injunction.

The pilots could decipher the code: "ignore the TRO." As APA intended, the sick-out continued; in fact, the pilot sick list increased. Compared to February 10, 1999—the date the TRO issued—when there were 2,295 pilots on the sick list and American cancelled 1,011 flights, on February 11, 1999, the number of "sick" pilots rose to 2,472 and American had to cancel 1,181 flights.

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[6] The court of appeals rejected this argument, finding "the return-to-work directives [were] 'so lacking in authoritative forcefulness that they either were not heard at all . . . or were discounted as being merely stage lines parroted for the benefit of some later judicial review.'" (Pet. App. 14a (quoting *United States Steel Corp. v. United Mine Workers of Am., Dist. 20*, 598 F.2d 363, 366 (5th Cir. 1979)).

3. The Petitioners Quickly Ended The Sick-Out When A Contempt Finding Was Imminent

Faced with the meltdown of its flight schedule, mounting and sizeable financial losses, and irreparable harm to its customer relations, American sought and obtained a Show Cause Order on February 11, 1999. By the close of the full-day February 12 Show Cause hearing, petitioners' contempt was apparent. The district court recessed until Saturday, February 13 when it would deliver its ruling.

No doubt realizing that the undisputed evidence warranted a contempt finding, petitioners finally abandoned their "wink-and-a-nod" posture and complied with the TRO. On February 12 at 8:00 p.m., LaVoy issued his first meaningful Hotline message, web-site posting, and blast e-mail, all of which could have and should have been issued two days earlier:

> I want to make a **personal plea** to all of our pilots: the Association's leadership needs your help in complying with Judge Joe Kendall's Order. We need to get this airline back up and running at full capacity, and we need to do so quickly. Please **clear the sick list immediately** and resume your normal schedule. Again, APA is absolutely serious about doing all we can to comply with the Judge's Order, and APA's entire leadership is asking for your help in doing so.

(Pet. App. 72a (emphasis added))

The petitioners followed up that night with another back-to-work plea signed by the entire Board and National Officers:

> February 12, 1999 8:45:23 P.M.
>
> Fellow Pilots:
>
> The AP National Officers and Board of Directors are making our best effort to comply with the Temporary Restraining Order issued by Judge Kendall on Wednesday afternoon. All of us in the APA leadership

> are making a **personal appeal** to our fellow pilots **to clear the sick list immediately** and to resume their normal schedule. **APA's entire leadership firmly believes it is in the best interest of the Allied Pilots to do our part to fully restore the American Airlines system. We need your help to do this and we need it now.**

(Pet. App. 73a (emphasis added))

The APA also, for the first time, utilized its full communications network to broadcast the back-to-work message, including: e-mailing 6,400 pilots; activating phone trees to telephone pilots; and convening a conference call to encourage each member of the APA Board of Directors and the APA Negotiating Committee to contact pilots in their domiciles. The APA Board once again led by example; nine of twelve Board members cleared the sick list on the evening of February 12. Rank-and-file pilots rapidly followed suit, and American's flight schedule quickly returned to normal.

On February 13, 1999, the district court held petitioners in contempt of the TRO for the two-day period of February 10 to February 12. The court found, based on extensive fact-finding, that the February 10 and 11 Communications were intentionally and foreseeably ineffective. It further concluded that, because of their earlier pre-conditioning of the rank-and-file, petitioners had failed to use their best efforts to attain compliance with the TRO. The district court concluded, as a matter of law, that the APA's violations of the TRO amounted to a ratification of the sick-out by the APA and held LaVoy and Mayhew jointly and severally liable with the APA for the resulting damage to American. The court of appeals rejected petitioners' challenges to the evidence supporting these rulings and affirmed each of them.

4. Petitioners' Contempt Caused Huge Financial Losses To American.

For two days, Defendants not only ignored, but actively defied, the TRO. This disregard for the court's order caused 2,279 flight cancellations that would not have occurred had the APA acted on February 10 as it finally acted on February 12.[7] Although American ultimately lost over $250 million because of the sick-out, it only sought compensation for the $50.96 million *directly caused by petitioners' two-day defiance of the TRO.*

Giving petitioners the "largest benefit of the doubt possible," the district court discounted American's damages calculation by 11% and found APA liable for $45.5 million in damages. The district court held LaVoy and Mayhew jointly and severally liable for the damage caused by their failure to use their best efforts to end the unlawful sick-out they organized and sustained. The court of appeals rejected petitioners' complaints that they did not receive enough discovery related to the contempt proceedings and affirmed the contempt finding and damages award in their entirety.

REASONS TO DENY THE PETITION

There is nothing remarkable about this case except the hubris of the Allied Pilots Association and the individual petitioners. Faced with paying for the consequences of a labor relations strategy that included, as central features, an illegal sick-out and premeditated contempt of a United States District Court's temporary restraining order, petitioners ask this Court to change one hundred years of precedent to immunize them from paying for the effects of their contempt in this case and to facilitate the future use of their lawless labor strategy.

---

[7] The sick-out caused a total of 6,681 American flight cancellations from February 5 through February 16.

No aspect of this petition or the underlying litigation warrants this Court's review. The district court dealt fairly and even-handedly, in a manner consistent with the United States Constitution and the decisions of this Court, with the violation of the Railway Labor Act that necessitated the underlying lawsuit and with the petitioners' contempt of the district court's order to "take all reasonable steps within their power" to end it. No court of appeals has reached a contrary result in a compensatory, civil contempt case, and, thus, petitioners do not even assert any such conflict. Accordingly, the Court should deny the petition.

I. NEITHER UNSETTLED QUESTIONS OF LAW NOR FACTUAL EVIDENCE OF UNFAIRNESS SUPPORT CONSIDERATION OF THE QUESTION PRESENTED IN THE PETITION

There is no vacuum in the law concerning the process due in compensatory civil contempt proceedings. Moreover, the factual record does not support petitioners' characterization of (1) the nature of the underlying injunction, (2) the process the district court afforded to them in adjudging their contempt or in determining the consequent damages, or (3) the severity of the sanction, which simply compensated American for the direct damages of the contempt.

A. The Standard Of Procedural Due Process In Civil Contempt Proceedings Is Settled.

The district court's handling of the contempt proceedings in this case neither conflicted with this Court's precedent nor created a substantial federal or Constitutional question. The Fifth Circuit correctly affirmed, and petitioners do not contest, that petitioners' conduct during the 48-hour period following issuance of the district court's February 10, 1999 temporary restraining order constituted contempt of that order, and that the damages imposed were compensatory and

civil in nature.[8] (Pet. 14) Instead, petitioners seek to create a gap in the law of civil contempt where none exists and to achieve procedurally what the substantive law denies them—a free pass to disrupt the nation's transportation system to gain leverage in a labor dispute through defiance of a concededly proper court order.[9]

Procedural due process is not a technical concept with a fixed content. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961). Rather, it is flexible, requiring the courts to calibrate the procedural protections necessary according to the particular circumstances presented. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In *International Union, UMWA v. Bagwell*, the Court comprehensively reviewed the spectrum of procedural due process requirements arising in various types of civil and criminal contempt cases. 512 U.S. 821, 830-34 (1994) (balancing "necessity" of a speedy hearing against "potential for abuse").

At one end of the procedural due process spectrum—where summary action is justified—is immediate, direct, petty civil or criminal contempt where the necessity to uphold the power of the court clearly outweighs the danger of erroneous fact-finding or erroneous deprivation of life, liberty or property. *See, e.g., Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 820-21 (1987) (Scalia, J., concurring); *Codispoti v. Pennsylvania*, 418 U.S. 506, 513 (1974). At the other end is serious criminal contempt, whether direct or indirect, where full criminal procedural protections of right to counsel, jury trial and beyond a reasonable doubt burden of proof are required. In such a proceeding, the danger that factual error could result in serious criminal sanctions,

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[8] Petitioners do not seek review of the court of appeals' affirmation of the district court's findings of fact or conclusions of law.

[9] Petitioners stipulated in the district court that the pilots' concerted sick-out was illegal under the Railway Labor Act. *See* Pet. App. 3a n.6.

involving deprivation of life, liberty or property, clearly affects the necessity for swiftness. *See Bagwell*, 512 U.S. at 839; *Hicks v. Feiock*, 485 U.S. 624, 632 (1988); *Bloom v. Illinois*, 391 U.S. 194, 210 (1968).

Between the extremes of summary procedures on the one hand and a criminal jury trial on the other, due process requires exactly what the district court provided below before imposing a compensatory civil contempt sanction—notice of the alleged contumacious conduct and an opportunity to be heard in defense. *See Bagwell*, 512 U.S. at 833 (notice and hearing required for indirect civil contempt of orders to carry out "discrete, readily ascertainable acts"); *Taylor v. Hayes*, 418 U.S. 488, 498-99 (1974) (notice and hearing required for delayed adjudication of direct contempt); *Cooke v. United States*, 267 U.S. 517, 534-37 (1925) (notice and hearing required for indirect civil contempt).

The *Bagwell* decision imposed heightened procedural burdens only for a "discrete category" of "wide-spread, indirect contempts of complex injunctions through *noncompensatory* fines," which the Court found constituted *criminal*, not civil, contempt sanctions. 512 U.S. at 838-39 (expressly noting that its holding "leaves unaltered the *longstanding authority of judges to . . . enter broad compensatory awards* for all contempts through civil proceedings") (emphasis added). The courts have long recognized the soundness of vindicating private litigants' rights through compensatory relief in civil contempt proceedings, as a distinct remedy from civil coercive relief or criminal contempt sanctions. *See, e.g.*, Margit Livingston, *Disobedience and Contempt*, 75 Wash. L. Rev. 345, 349 (2000) (tracing historical developments in contempt power and noting that remedial civil contempt was an accepted category of contempt by the twentieth century).

If compensatory contempt is to achieve its goal to further the substantive law underlying the injunction, the procedural rules must be flexible and appropriate to the substantive law.

See Douglas Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. Ill. L.F. 971, 973 (1980). In this case, the preeminent policy of the RLA to avoid disruption of the national transportation system justified the prompt, yet deliberate, action by the district court. By the time of the show cause hearing, the pilots' sick-out had inconvenienced over 450,000 passengers and caused the cancellation of 4,902 flights. [Feb. 12 Tr. 17:23-18:1; 19:10-24] American's flight operations, and its customers' patience, were approaching collapse. Moreover, the contempt was not "a completed act" as petitioners claim, but an *escalating campaign of self-help*. Petitioners' ongoing defiance, in response to a court order issued as a result of a direct violation of the Association's and the 1200 "sick" pilots' affirmative duty under Section 2 First of the RLA to avoid "any interruption to commerce or to the operations of any carrier growing out of any dispute between the carrier and [its] employees," justified the expedited, but far from summary, procedures in the district court. 45 U.S.C. § 152 First.

The potential for arbitrariness in this case was minimal because the TRO was clear, the required compliance steps were simple, and there was no factual dispute about what petitioners had done (and not done) to comply. Petitioners disputed only the district court's legal conclusion about the sufficiency of their conduct in light of the clear mandates in the TRO. This was not a case where final adjudication of contempt could be delayed until after the merits determination on the underlying injunction. *See Taylor v. Hayes*, 418 U.S. at 497-98 (discussing circumstances in which contempt determination may be properly postponed). The Association's defiance of the TRO was crippling the national transportation system.

Petitioners' attempt to analogize the simple back to work order to the "complex injunction" at issue in *Bagwell* simply

does not withstand scrutiny. There was nothing about the district court's TRO that would have involved the court in extended disputes between the parties or placed it a continuing supervisory role over them—the characteristics of "complex injunctions" that require heightened due process. *Bagwell*, 512 U.S. at 842 (Scalia, J., concurring in judgment). Nor can APA sustain the analogy of its continuing contempt to the "completed acts of disobedience" in *Bagwell*. (Pet. 20) The APA officers were intransigent at the February 12 hearing. The sick-out was escalating, more flights were cancelled for lack of pilots, twelve Board of Directors members were still on the sick list, and there was no plan to undertake the same affirmative communications to end the sick-out that were used to instigate it. APA's officers testified that they intended to continue their current course of conduct (and lack of effective action) unless ordered to do something different.

Petitioners argue that the district court had two choices on February 12 when faced with undisputed evidence of petitioners' premeditated contempt. It could have imposed coercive sanctions, providing the petitioners with a free pass for the first two days of premeditated contempt. Or, it could have let the contempt continue while the parties undertook discovery, motions, and a full trial on the merits, simultaneous with the underlying civil action for injunctive relief. This Court's jurisprudence has recognized for a century that civil contempt sanctions may be either coercive or compensatory, as required to enforce obedience to the court's orders. There are times, like this one, when civil contempt may only be remedied by "paying for what you break." Neither the choice of the appropriate remedy nor the size of the compensatory damages ties the lower court's hands

in taking timely action to adjudge and terminate premeditated defiance of its orders.[10]

Moreover, neither of these two alternatives would vindicate the preeminent purpose of the RLA, which is to avoid disruptions to the nation's transportation system. The "get out of jail free" approach of coercive civil contempt, in which the contemnor remains at liberty to disobey the injunction until a show cause hearing and, after a finding of contempt, the opportunity to purge without penalty, undermines the principles of the RLA. The stakes in the national transportation system are simply too high—as evidenced by the enormous financial losses caused by just the two days of the sick-out after the TRO and the serious inconvenience to 450,000 passengers. The courts below properly refused to adopt a process that can be "gamed" by the contemnor to allow a period of defiance of a court order without penalty.

Similarly deflating to the goal of Section 2 First of the RLA is erecting lengthy and unnecessary procedures in the path of compensatory civil contempt findings. This case demonstrated the power of compensatory contempt sanctions to quickly end civil contempt, and the underlying illegal work stoppage. Delaying the finding would sharply reduce the efficacy of the remedy, induce prolonged and greatly disruptive litigation, and increase the vulnerability of the nation's transportation system.

The self-serving approach APA urges would unnecessarily diminish the array of remedies available to courts to vindicate their orders and to promote the public interest in the restoration of vital transportation services.

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[10] "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

B. Petitioners' Characterization Belies The Facts And Process That Occurred Before The District Court

The district court struck the appropriate balance between "necessity" and "potential arbitrariness" in this case. While expeditious—in view of the public policy underlying Section 2 First of the RLA, the extent of the disruption to transportation, and the millions of dollars of damages American incurred every day the contempt continued—the procedures were not "summary" in nature. The TRO clearly set out, in specific affirmative terms, the conduct required of APA's officers and everyone acting in concert with them.[11]

When the sick-out escalated rather than abated following issuance of the TRO, American sought a show cause order, spelling out the basis for its charge of contempt by APA and its officers. American served the show cause motion, supporting affidavits and notice of hearing on APA by hand. American, which bore the burden of proving contempt of the TRO, operated under the same time constraints as the APA. APA and nine of the individual defendants appeared at the full-day show cause hearing, represented by counsel. Each testified and had the opportunity to present a defense. **The facts of the APA's conduct to comply with the TRO were uniquely in the possession of the defendants. The facts that formed the basis of the district court's contempt finding were not in dispute, and are not contested in this Court.** The district court considered the facts and prepared a detailed memorandum opinion before issuing the contempt

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[11] Once LaVoy decided to comply, he simply and effectively posted a notice on the APA web-site, recorded a Hotline message, convened his Board on a telephone conference call and instructed them to call off the sick-out. Within hours, more than half the pilots (and 9 of 12 Board members) cleared the sick list and flight operations quickly began to return to normal. These were the reasonable actions of a party acting in good faith to comply with a court order.

judgment. It deferred contempt findings with respect to absent defendants and held only LaVoy, Mayhew and the APA in civil contempt.

The damages portion of the contempt proceedings appropriately provided additional process. On February 17 the district court heard the direct and cross examination of American's two damages experts on the direct cost, in the form of lost revenue from cancelled flights, of the contempt. The court also admitted ten exhibits. The district court then granted APA's motion for a continuance and discovery, in part, by continuing the damages proceedings for two months (until April 12) and ordering document discovery on the damages issue. APA obtained voluminous business records, records that formed the basis of the opinions of American's expert witnesses. When the proceedings reconvened for two days of hearings in April, APA presented four defense witnesses, entered nine additional defense exhibits and reexamined American's experts.

Petitioners do not dispute the factual record (either of the contempt or the amount of the damages) and have never proffered a specific explanation of what additional procedures they should have had and how any procedures possibly would have affected the outcome.[12] APA's real quarrel is that they got caught red-handed in premeditated contempt of a TRO enjoining an illegal sick-out and have been made to pay the

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[12] Petitioners complain that the district court did not permit them to present testimony in the damages hearing from 273 individual pilots who would have testified that they were truly sick and did not call in sick at the instruction of petitioners. Because the evidence showed there were generally 300-400 pilots on the sick list at any time but, during the two-day contempt period the number of "sick" pilots averaged over 1,200, it cannot be argued seriously that the district court abused its discretion in rejecting the relevance of this testimony. Moreover, the Court of Appeals found that "defendants have not demonstrated how additional discovery would shed any significant amount of light on the issue [of damages]." (Pet. App. 21a)

considerable damages their illegal and contumacious conduct caused. Having lost their meritless challenge to the correctness of the district court's conclusion of law that their post-TRO conduct was "too little, too late," petitioners now seek to persuade this Court that they should have been permitted either to subject American and the traveling public to a prolonged sick-out while pursuing unnecessary discovery and a trial (possibly before a jury) or to have enjoyed a free pass for the first two days of their contempt. There is no support in the law for either alternative and both are hostile to the purpose of the RLA.

II. There Is No Basis To Apply The Maximum Procedures In The FRCP To An Ancillary Civil Contempt Proceeding Within A Civil Action

Due process does not require application of the full range of process in the Federal Rules of Civil Procedure to ancillary portions of a civil action. The contempt proceeding in this case was *ancillary* to American's complaint for preliminary and permanent injunctive relief to end the Association's illegal self help in a labor dispute subject to the RLA. *See Fox v. Capital Co.*, 299 U.S. 105, 107-08 (1936) (civil contempt is ancillary and may be appealed only as part of appeal from final judgment on underlying action); *see also Gompers*, 221 U.S. at 444-45 (contrasting criminal contempt proceedings, which are not treated as part of the original cause with civil contempt proceedings, which are).

The Federal Rules of Civil Procedure provide the district courts with flexibility and discretion to tailor the process due to the rights asserted and the relevant circumstances of the action. After assuring basic notice of the contempt allegations and the opportunity to be heard in defense—which petitioners unquestionably received in this case—the district court had broad discretion to set the scope and schedule of discovery and to conduct the hearing. *See In re: Sealed Case*

No. 98-3077, 151 F.3d 1059, 1068 (D.C. Cir. 1998) (noting that district courts have a wide degree of latitude in the oversight of discovery); *Laborers Int'l Union of North Am. v. U.S. Dept. of Justice*, 772 F.2d 919, 921 (D.C. Cir. 1984) (noting that control of discovery is a matter entrusted to the sound discretion of the courts).

Federal Rule 26, which governs discovery in a civil action, begins each relevant subpart with the words, "[e]xcept . . . to the extent otherwise . . . directed by order," Fed. R. Civ. P. 26(a), or "unless otherwise limited by order of the court," Fed. R. Civ. P. 26(b). Federal Rule 26 also permits the court to order that discovery be limited or not be had when it would be oppressive or pose an undue burden or expense. Most significantly, the Federal Rules limit the scope of discovery to "any matter . . . *that is relevant* to the claim or defense of any party," Fed. R. Civ. P. 26(b)(1) (emphasis added), and permit the court discretion to "act upon its own initiative" to limit the extent of discovery "otherwise permitted under these rules." Fed. R. Civ. P. 26(b)(2). The court has broad discretion to take into account the party's opportunity to obtain the information in other ways and the importance of the discovery in resolving the issues. *Id.* This language reflects the great deference accorded to a district court in managing discovery. Similarly, the Federal Rules leave to the sound discretion of the district court the decision whether to hear evidence on motions by affidavit or by oral testimony. Fed. R. Civ. P. 43(e).

This case exemplifies why the Federal Rules do not mandate a rigid menu of discovery selections in civil actions, much less in ancillary civil contempt proceedings. *See D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993). In *D. Patrick* the court of appeals held that full discovery was not required "[b]ecause the contempt proceeding is concerned solely with whether or not the respondent's conduct violates a prior court order." *Id.* The

court added that in contempt proceedings, "parties cannot reasonably expect to litigate to the same extent that it might in a new and independent civil action." *Id.* In the February 12 hearing, the only issue was whether the conduct of APA's officers complied with the terms of the January 10 TRO. The only "discovery" needed was for APA to ask its officers what they did to comply with the TRO and when. APA officers possessed first-hand information about, and copies of, all of the web-site postings, Hotline recordings and telephone watch scripts that they had prepared and disseminated. On the more fact-intensive issue of American's damages, the district court granted extensive document discovery and ample time for APA to review, analyze and rebut the damages data.

Petitioners' claim that the Federal Rules of Civil Procedure are the "benchmark for full civil due process" stands naked of any legal authority.[13] (Pet. 26-28) Without apparent regard for the widespread repercussions of their request on the federal district courts, they ask this Court to hear their case and to rewrite one hundred years of contempt jurisprudence

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[13] *Nelson v. Adams* certainly does not advance petitioners' argument. 529 U.S. 460, 120 S. Ct. 1579, 1584 (2000). In that case, the district court adjudged Mr. Nelson's liability on the basis of an amended pleading that was never filed with the court and never served on Mr. Nelson. The "swift passage from pleading to judgment" in that case occurred when the court *simultaneously* granted the motion to add Mr. Nelson as a party and entered judgment against him. *Id.* That was not, contrary to petitioners' assertion, the situation that occurred here, Pet. 26, when petitioners received service of the show cause motion and supporting affidavits, filed a pre-hearing Motion to Dissolve Show Cause Order and Memorandum Brief in Support, or Alternatively, Answer to Plaintiff's Motion for Contempt (R. 140-49), participated fully in a full-day hearing on contempt, obtained a continuance on the issue of compensatory damages, propounded discovery, received and analyzed over 12,000 pages of documents, examined under oath (not once but twice) American's damages experts and prepared and presented rebuttal damages testimony. This is more than the minimum process that is due under the Fifth Amendment.

to save them from their premeditated contumacy. The Court should reject that request.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 22, 2001

APPENDIX

APPENDIX

Date: Fri, 5 Feb 1999 18:36:02-0600
Reply-To: APA Challenge & Response <C-R@ALLIEDPILOTS.ORG>
Sender: APA Challenge & Response < C-R@ALLIEDPILOTS.ORG>
From: Error! Bookmark not defined. <monesterio@954ACCESS.NET>
Subject: Error! Bookmark not defined
Content-Type: text/plain; charset=ISO-8859-1

....

Today, February 5, 1999, is "the line in the sand". This date was established by your APA Board on Saturday morning, January 30, 1999 during a lengthy conference call that revealed a lack of progress in negotiations. The Company was made aware of this date. APA negotiators attempted to deliver closure on these two seemingly simple items. The company was further informed that their resistance or inability to close on these items would be considered a continued violation of SCOPE and would not be tolerated beyond the end of this business day. Unfortunately, closure was not reached.

We can no longer ask you to withhold expressing your indignation at AMR's failure to respect your contractual rights. Each pilot should feel free to send whatever message, in any manner, that he/she feels necessary to express his/her displeasure. Hopefully, your resolute actions will bring this odious situation to an end.

Respectfully,

Captain Lloyd D. Hill, Miami APA Chairman F/O Bob Ames, Miami APA Vice Chairman

Date: Fri 5 Feb 1999 19:31:04-0600
Reply To: APA Challenge & Response
< C-R@ALLIEDPILOTS.ORG>
Sender: APA Challenge & Response
< C-R@ALLIEDPILOTS.ORG>
From: Terry McCarthy DFW/FO/S80/D 168466
#6068 <tmccarthy@NEWMILTEK.COM>
Subject: URGENT MESSAGE ABOUT SCOPE
Content-Type: text/plain, charset=ISO-8859-1
Today's E-Mail from Larry & Norm to All DFW Pilots:
February 5, 1999
To All Fellow Pilots:
AMR Management has refused to agree to a fair and equitable negotiated settlement of the Reno Air Scope violation. Meanwhile, they continue to control and operate Reno as a C-Scale airline. These jobs belong to us, the pilots on the American Airlines seniority list. It is certainly unfortunate that AMR management has moved so little on our concerns about Reno. They have refused to recognize December 23rd as the control date and have resolved none of the pay issues. They will not state, in writing, that they will not codeshare with Reno and they remain firm in their belief that they reserve the option to do so. Our proposal for a bid run, by seniority, for the Reno flying was flatly rejected.
There has been a great deal of stress associated with these actions by management. We are all feeling its ill effect and, in the absence of an adequate remedy, APA leadership is asking all pilots system-wide to consider whether they are 100% capable of performing their duties in the cockpit. Remember, self-assessment of your physical and mental well-being is your obligation under Federal Law. If you find yourself unable to perform your duties, you should consider your contractually available options - prior to your next scheduled trip
We remain committed to a negotiated settlement of this violation of Scope, the contractual cornerstone of our careers

at American Airlines. Your Union leadership needs your help to convince management of our collective resolve. Attached are some items and recommendations for your consideration.
Sincerely,
Captain Larry Foster Chairman
Captain Norm Patterson Vice Chairman

THINGS TO CONSIDER

It is possible that management will file an injunction against APA. That does not mean that you must fly if you are "sick." If you are sick, contact Crew Schedule immediately and let them know.
You are not required to state the nature of your illness. If you are having trouble contacting crew schedule follow this procedure:
Call 1-800-VIP CREW twice and let the phone ring each time until you are certain that it is not going to be answered. Log the times you called.
Repeat the above procedure, call 817-956-CREW. Log the times you called.
Call the emergency number, 817-967-7800. Log the time you called.
Also try 817-967-7849. Log the time you called.
If you are familiar with the procedure, use HISEND in PCFOS.
Once you are on the sick list, you are under NO obligation to answer your phone or, in any way explain yourself. If you happen to answer your phone and it is the flight office, politely tell them that you are sick and that any further discussion will take place with union representation once you are well.
Sick is defined by Webster as:
sick: a) affected by disease b) spiritually unsound c) sickened by strong emotion d) depressed e) lacking vigor
Do you meet this definition? If so avail yourself of your negotiated rights.

Tom Cook, president of SABRE's Technology Solutions division, said what the airlines won't say when he told an IATA gathering of airline financial executives:
"Everyone in this room would like to outsource their pilots."

Date: Fri, 5 Feb 1999 18:07:33-0600
Reply To: APA Challenge & Response
< C-R@ALLIEDPILOTS.ORG>
Sender: APA Challenge & Response
< C-R@ALLIEDPILOTS.ORG>
From: error! Bookmark not defined.
Subject: Lax Hotline Friday-Two thumbs :-(
Content-Type: text/plain, charset=ISO-8859-1
LAX Hotline Friday February 5, 1999
Ladies and gentlemen I am very sorry to say that as of 5pm today, CST your APA negotiators were unable to reach an agreement with management concerning a remedy for the scope control violation of 12/23/98. Additionally there was no commitment from management not to codeshare on Reno Air
There was some movement on other merger issues such as integration timelines, pay, fences and benefits but AMR refused to address the core issues critical to APA's pilots. Recall that what we needed were absolute commitment to our core issues:
* That a commitment be made, in writing, that management will not codeshare with Reno without an exception from APA to the scope clause or an acceptable integration agreement; and
* That management commit to the Green book economic remedy proposed by APA retroactive to the 12/13/98 control date.
The failure of negotiations today is extremely disappointing and represents a low point in the roller-coaster of emotions our pilots have withstood while waiting for AMR to both recognize ownership of the control violation, and agreement

for economic compensation retroactive to the control date of December 23rd.

I know this news is devastating to many whom had hoped management would take seriously, how important these core issues are. It shows disrespect for your contract, disrespect for your contribution, and disrespect for your character.

Additionally American has shut down Trip Trade with Open Time in direct violation of our contract. Because of this unilateral act we suggest that you discontinue use of TTOT overtime and makeup flying.

Fellow pilots, we understand your emotion on these issues and are deeply concerned. As airline pilots we have a public trust to consider. There has been a great deal of stress associated with the blatant contract violations for which there has not been adequate remedy. APA leadership has received numerous reports of pilots possibly flying while less than 100% focused on the operation.

This is the time of year when colds, flu and viruses abound. In addition to the normal health concerns, the stress and distraction due to our current contract dispute appears to be taking its toll. As an organization dedicated to safety, we cannot tolerate any degradation of safety within our cockpits.

APA leadership is asking pilots, SYSTEM-WIDE, to assess whether they are at 100% capactity to perform their professional duties in the cockpit. If you find yourself unable to perform your duties at 100% you should consider calling in sick. Your FAA Medical Certificate states clearly that you "shall not act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person knows or had reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation." (FAR61.53(a)).

Sick is defined by Miriam-Webster as:

1: affected with disease or ill health . . . 2: spiritually or morally unsound or corrupt . . . 3: sickened by strong emotion . . . 4: mentally or emotionally unsound or disordered . . . 5: lacking vigor . . . If you are affected by any of these symptoms, you may not be 100% and may be legally prohibited from exercising the privileges of your FAA Medical Certificate. NO one should feel intimidated about using their legal, negotiated sick leave benefits, especially when the consequences of violating FAR 61.53 are so potentially severe.

We are very concerned that our pilots will be "mission hackers" and fly when they should not. Captains, please make every effort to ensure that your crew is not emotionally distracted in any way. Please don't engage in discussion in the cockpit that could cause a safety hazard.

If you decide that you are unfit to fly your next trip, and MOST pilots probably are, then you should contact crew schedule immediately to let them know you are SICK. You are not required to state the nature of your illness, and do not allow yourself to be dragged into a discussion about it. Log and document your calls to crew schedule or use HISEND if you must and keep a hard copy.

Pull up an HI-1 for you records Once you are on the sick list you are under no contractual obligation to answer your phone. In the event the flight office calls, politely tell them that you are sick and any further discussion will take place with APA Union representation when you are well. Our intention is to vigorously defend any pilots' right to use their sick leave appropriately. It is possible that a Federal Judge will enjoin the APA from an alleged illegal job action. If that happens it does NOT mean that you, as an individual, may return to work if you still feel too stressed to perform safely in the cockpit. Remember the FAA has given YOU the final determination whether or not you are fit for flying duty.

Fellow LAX pilots, we are asking that each of you assist in spreading the word. When you receive this message, please consult your hard-copy Domicile Roster and make an effort to personally speak to at least three pilots above and below you. If they don't have e-mail, read them this message. This will insure that the word quickly gets out to all our members, and that no one is standing alone. The Domicile Telephone Committee will be looking for help. If contacted, please assist. It is a small investment for our contract and our careers.

Your LAX reps, along with the rest of APA leadership, deeply regret this turn of events and appreciate your support of the Association throughout this difficult and frustrating period. Together we will prevail and achieve the objectives that were agreed to in our contract with AMR management.

Captain Denny Breslin Chairman LAX

(4)

No. 00-1016

Supreme Court, U.S.
FILED
FEB 1 2001
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IN THE
Supreme Court of the United States

ALLIED PILOTS ASSOCIATION,
RICHARD T. LAVOY,
AND
BRYAN A. MAYHEW,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The open question in this Court presented by this case and by our *certiorari* petition concerns the contempt/procedural due process principle of *Mine Workers v. Bagwell*, 512 U.S. 821 (1994), and its proper application to compensatory civil contempt cases. *See* Pet.(i).

For the most part, Respondent American Airlines, Inc. ("American"), in its Brief in Opposition ("Opp. Br."), would have it that *Bagwell*'s contempt/due process teachings and the requirements of due process are an irrelevancy in this case in that—on American's tendentious account—the District Court's contempt findings have adequate evidentiary support. *See* Opp. Br. 4-14, 20-22.

Beyond that, after recognizing and stating *Bagwell* (Opp. Br. 14-16), American argues first that the proceedings in this case satisfied due process (Opp. Br. 17-22), and then that civil contempt proceedings are "ancillary" proceedings, and, as such, do not in any event call for "the maximum procedures" of civil due process (Opp. Br. 22-24).

Given American's approach this reply is in two parts: *First*, to refocus this matter on the issues that are germane at this jurisdictional stage, we briefly summarize the case for granting the writ here and underline American's inability to offer any cogent rebuttal thereto. *Second*, we take up the points that American does essay and demonstrate that each is not only unresponsive but unsound in its own terms.

1. The gist of our *certiorari* petition is that the open question presented is a due process question of the first magnitude that goes to the fair and even-handed adjudication of claims that a party has violated an injunction. It is our submission that *certiorari* is warranted here because the Fifth Circuit's answer to this question is wrong in its holding,

wrong in its method, and pernicious in its inevitable consequences:

(a) The Court of Appeals' holding—that a party facing compensatory civil contempt charges bottomed on allegations of past out-of-court disobedience to a complex injunction, where enormous financial consequences are at stake and proof of liability requires findings of fact regarding compliance, ability to comply, and the imputation of responsibility for alleged nationwide wrongdoing to a national organization and its officers—is wholly inconsistent with basic notions of due process and with *Bagwell*'s contempt/due process teachings.

(b) The Court of Appeals' method—refusing "to apply the principle enunciated in *Bagwell*" and instead relying on lower court precedents that are inapposite, outdated, or both, Pet. App.16a-17a—is an abdication of its responsibility as a lower federal court to follow this Court's guidance in deciding substantial legal questions.

(c) By placing an appellate imprimatur on the shotgun process by which this case was adjudicated in the District Court, the decision below has mischievous potential that reaches far beyond this case. The Fifth Circuit's holding can only encourage the kind of trial court contempt proceedings—and the concomitant judicial abuses—that this Court's entire contempt/due process jurisprudence is intended to prevent: The adjudication, by the judge who issued an injunctive order, of allegations of disobedience to that order through procedures that differ markedly from those that have been established over the years as the basic requisites of due process for comparable non-contempt proceedings. Such an encouragement is particularly troubling in that, as one commentator has recently observed:

> The U.S. Supreme Court decided *Bagwell* in mid-1994. ... All in all, the predominant reaction of the

> lower courts, particularly state courts, has been a *sub rosa* rejection of the *Bagwell* holding. These courts may resist, perhaps subconsciously, the imposition of additional procedural restrictions upon what they view as an inherent judicial prerogative and a mechanism of self-preservation. [Margit Livingston, "Disobedience and Contempt," 75 Wash. L. Rev. 345, 390-91 (2000) (footnotes omitted).]

On all of the foregoing American has nothing to say in response or rebuttal.

2. (a) Turning now to the points American chooses to put into play, we begin with the Company's long, impassioned defense of the District Court's contempt findings as correct. Opp. Br. 2-14. We most certainly disagree. But we did not seek *certiorari* on the District Court's contempt findings, as trial-court errors in finding the facts—even gross errors—do not warrant this Court's intervention. We do note that American's shifting claims as to the Petitioners' "violations" of the TRO's requirements were attenuated in the extreme, that American's evidentiary showing at the contempt hearing was skeletal in the extreme, and that American's recitation goes beyond the District Court in taking profound liberties with the record.[1]

(b) To the extent that it does treat with *Bagwell*'s contempt/due process principle and its rationale, American

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[1] In our petition, we reviewed the undisputed record evidence regarding the Petitioners' TRO compliance efforts at Pet. 4-5, and we reviewed the evidence submitted at the February 12 liability hearing at Pet. 6-8, and will not trench on the Court's time by cataloging those matters a second time. Given that American gives pride of place to three pre-TRO e-mails that were attached to American's TRO application, to the point of attaching them to its brief in this Court (Opp. Br. 2, 3, 5-7, 8 n.5, 1a-7a), we do add that *none* of those e-mails was admitted into evidence in the February 12 contempt hearing, and, perforce, there was *no* evidence submitted at that hearing that LaVoy or Mayhew knew of those e-mails.

does so by arguing that these compensatory civil contempt proceedings did meet the requisite due process standard. Nothing could be further from the truth.

(i) American begins by characterizing the proceedings as "expedited, but far from summary." Opp. Br. 17; *see also id.* at 20-21. If this were the test, we would take issue with American's characterization. But it is the actual substance and character of those proceedings that matters. In that regard, the Petitioners were found liable for compensatory civil contempt—a liability later valued at $45,000,000—through the following proceedings:

- an American motion for an order to show cause (filed less than 24 hours after issuance of the TRO) and a District Court order to show cause issued immediately on the filing of the motion, both of which were served on the Petitioners together as a *fait accompli* at 5:00 p.m. on Day One;
- a one-day liability hearing, starting at 10 a.m. on Day Two;
- a contempt liability ruling issued at 10 a.m. on Day Three, which the District Court later ruled was preclusive on the question of liability; and
- "damages" proceedings, lasting three days over the next two months, during which Petitioners were precluded from "relitigat[ing]" or "revisit[ing]" contempt liability—notwithstanding that the District Court permitted *American* to supplement the liability record with exhibits that featured prominently in that court's augmented June 23 liability findings. *See* Pet. 2, 5-13.

American's "expedited, but by no means summary" characterization is thus nothing more than a PR spin on the procedural facts. And, the procedural facts show that the

District Court's conclusive liability findings and conclusions were made without affording the Petitioners any of the ordinary incidents of due process applicable in a civil damages lawsuit involving issues of comparable complexity and a potential liability of comparable magnitude—*viz.*, a reasonable time within which to prepare a defense, an opportunity for discovery, and a full trial on the merits.

(ii) Under the *Bagwell* principle and its rationale, such a departure from the ordinary incidents of due process is not countenanced in the contempt arena without justification, and the touchstone for "justifying expedited [contempt] procedures" is the principle of "necessity." 512 U.S. at 832. And, on "necessity," American urges that "Petitioners' ongoing defiance [of the TRO] justified the expedited, but far from summary, procedures" employed by the District Court to adjudicate compensatory contempt below. Opp. Br. 17. American elaborates that "[t]his case demonstrated the power of compensatory civil contempt sanctions to quickly end civil contempt." Opp. Br. 19.

American's argument conflates *compensatory* civil contempt into *coercive* civil contempt and elides the critical differences between the two. It is those differences that make expedited/summary procedures constitutionally acceptable in *coercive* contempt but *not* in *compensatory* contempt, and it is the efficacy of expedited/summary coercive contempt procedures that makes expedited/summary compensatory contempt procedures both unnecessary and improper.

Coercive civil contempt proceedings are the time-honored means for securing obedience in the face of a continuing or threatened violation of a court order. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). In coercive civil contempt proceedings, the court utilizes day-to-day sanctions to "exert a constant coercive pressure, and once the jural command is obeyed," any future fine liability or imprisonment is "purged." *Bagwell*, 512 U.S. at 829. In *Bagwell* terms, the

exigencies attendant upon a continuing violation provide the "necessity" justification for "expedited procedures" in coercive contempt. *Id.* at 833.

Compensatory contempt, by contrast, is not concerned with securing future obedience but rather with compensating the plaintiff after the fact of disobedience. As this Court observed more than a century ago, compensatory contempt proceedings are "nominally those of contempt [but] really proceedings to award damages to the plaintiff." *Worden v. Searls*, 121 U.S. 14, 26 (1887). Given the retrospective focus of compensatory civil contempt, the necessity principle simply does not justify any departure from the general understanding that "*[l]ike any civil litigant*, a civil contemnor is ... *entitled to those due process rights, applicable to every judicial proceeding*." *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 380 F.2d 570, 581 (D.C. Cir. 1967)(emphasis added).

The sum of the foregoing is that American's attempt to justify the expedited proceedings by which this *compensatory civil contempt* case was adjudicated on the ground that such expedited procedures were necessary to stop an ongoing violation fails: the District Court's concern that there was an ongoing violation of the TRO's commands justified expedited *coercive* contempt procedures looking to purgable sanctions, *not* expedited compensatory contempt procedures for assessing final liability for monetary harm caused by that "violation."

To be sure, American claims that recognizing that distinction would present the trial courts with a Hobson's choice between "coercive sanctions, providing [the contemnor] with a free pass" for all pre-coercive-contempt-hearing violations, and "discovery, motions, and a full trial on the merits" for compensatory civil contempt. Opp. Br. 18.

American's alarmist argument presents a false dichotomy. Coercive civil contempt and compensatory civil contempt—

while distinct both in terms of their purposes and in terms of the procedures required by due process for each—are not mutually exclusive remedies requiring a court (or a party) irrevocably to elect one or the other. Nothing in the law—and nothing we argue—precludes a court from employing *coercive* civil contempt proceedings of a summary nature and imposing coercive fines payable to the court, and also holding compensatory civil contempt proceedings (affording a full trial on the merits of the charges) in order to compensate the plaintiff for any proven pre-compliance violations.

(iii) This brings us to American's last *Bagwell* argument, which is that the TRO here is not, in *Bagwell* terms, within the class of "'complex injunctions' that require heightened due process." Opp. Br. 18. American's characterization of the injunction here could not be more wrong.

Bagwell distinguished between cases "involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment," in which "the need for extensive, impartial factfinding is less pressing" on the one hand, and "[c]ontempts involving out-of-court disobedience to complex injunctions," which "often require elaborate and reliable factfinding" on the other. 512 U.S. at 833-34. As the concurring opinion added, the historical equity injunction "usually required 'a single simple act,' " whereas the modern "complex" decree "governs many aspects of a litigant's activities, rather than just a discrete act," and thus "determining compliance becomes much more difficult." 512 U.S. at 840-43 (Scalia, J., joined by Rehnquist, C.J., concurring) (citation omitted).

In these terms, it is plain that the TRO at issue here did not command "discrete, readily ascertainable acts, such as turning over a key or payment of a judgment," but rather was a broad labor injunction whose nine ordering paragraphs governed the

nationwide activities of a 9,300-member labor organization involved in a labor dispute with an international airline:

- In its first, prohibitory paragraph, the TRO enjoined the APA and its leadership from "calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing any interference with American's airline operations, including but not limited to any strike, work stoppage, sick-out, slowdown or other concerted refusals to fly." Pet. 29.
- The TRO then set forth one very general command directing the APA and its leadership to "take all reasonable steps within their power to prevent the aforesaid actions, and to refrain from continuing the aforesaid actions." *Id.*
- Seven further ordering paragraphs follow, each imposing notification and reporting obligations on the APA and its leadership. *Id.*

The TRO thus goes leagues beyond enjoining "discrete, readily ascertainable acts," *Bagwell*, 512 U.S. at 833, by "govern[ing] many aspects of a litigant's activities," *id.* at 843 (Scalia, J., concurring). And, given the nature and breadth of its commands, a claim of "[c]ontempts involving out-of-court disobedience" to this TRO does raise "more difficult" questions of compliance of the kind that "require elaborate and reliable fact finding," *id.* at 833-34. That being so, the TRO here is most certainly complex in *Bagwell* terms.

In this regard, the D.C. Circuit's decision in *National Org. for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994), on remand for reconsideration in light of *Bagwell*, is very much in point. The *Operation Rescue* injunction, like the TRO here, contained a series of far-reaching prohibitions. *Id.* at 661. The D.C. Circuit noted, therefore, that "[d]etermining whether alleged contemnors have incited, directed, aided or abetted others to commit acts prohibited by

this injunction demands elaborate factfinding." *Id.* And, that court added, this conclusion was supported by the fact that "the district court required ten pages of opinion just to summarize the findings of fact upon which these contempt citations were based." *Id.*

In light of the foregoing, *Operation Rescue* holds that although "the injunction here may be somewhat less 'complex' than that in *Bagwell*. ... on a scale of complexity ranging from simple affirmative acts ... to highly complex *Bagwell*-type prohibitory injunctions ... the out-of-court acts prohibited by the court's order here fall closer to the *Bagwell* end of the spectrum. *Id.* (citation omitted).

Just so here. The TRO's prohibitory paragraph alone is on all fours with *Operation Rescue*. That paragraph enjoined the defendants (and all those legally associated with them or acting at their direction) from various acts disruptive to the airline, and also prohibited "permitting, instigating, authorizing, [or] encouraging" such activities. Pet. 29. And, in fact, the District Court found the APA, LaVoy, and Mayhew liable for the continuance of the sick-out on these very agency grounds. Pet. App. 32a, 52a-53a.

Equally to the point, the contempt claim here, like the claim in *Operation Rescue*, most certainly raised more difficult questions of compliance that demanded elaborate fact finding. The District Court initially issued a seven-page, single-spaced decision—the first five pages of which were factual findings. *See* Pet. App. 29a-36a. And, that court's liability findings swelled to thirty-three single-spaced pages in the final opinion. *See* Pet App. 39a-77a.

(c) American's last-ditch argument—that because its civil contempt citation is, in American's terms, "ancillary to American's complaint for injunctive relief," there is no basis to apply "the maximum procedures in the [Federal Rules of Civil Procedure]" (Opp. Br. 22, 23-24)—is nothing but word

play. Calling a damages claim for alleged out-of-court disobedience of an injunction that raises complex issues and requires elaborate fact finding an "ancillary" rather than a primary claim does not change the nature of the claim, the nature of plaintiff's case, the nature of the defendants' case, or, we submit, the nature of the applicable due process requirements.

Not surprisingly, then, American can cite no authority for its position. *Fox v. Capital Corp.*, 299 U.S. 105 (1936), and *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911) (cited at Opp. Br. 22), hold nothing more than that civil contempt judgments (unlike criminal contempt judgments) may not be appealed until final judgment on the merits of the underlying action. *See Fox*, 299 U.S. at 107; *Gompers*, 221 U.S. at 444-45. Neither case describes civil contempt proceedings as "ancillary." Neither relates the appropriate time for appeal to the procedures that due process requires before a contempt judgments may issue. And, American fails to explain how appealability relates to the due process question. Nor does Rule 26 and the truism that district courts are afforded discretion to manage the discovery process (Opp. Br. 23-24) fill the void. It suffices to say that discretion under Rule 26 does not speak to the basic due process question raised in our petition.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our *certiorari* petition, the petition should be granted.

Respectfully Submitted,

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